United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

76-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/PS

UNITED STATES OF AMERICA,	:	JOINT APPENDIX TO BRIEF FOR APPELLANTS
Appellee,	:	
-against-	:	Docket No. 76-1495
EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DI MATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,	:	Appeal from a conviction in the United States District Court for the Eastern District of New York
Appellants.	:	VOLUME I

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UNITED STATES COURT OF APPEALS
FILED
FEB 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

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D. C. Form No. 100

CRIMINAL DOCKET

75CR 341

MISHLER, J.

75CR343

75CR341

TITLE OF CASE

THE UNITED STATES

vs.

X FRANK ANNESE, a/k/a Frankie Feets
X SALVATORE ANNARUMO
SAVERIO CARRARA, a/k/a Sammy Smash and Sammy
X MARTIN CASSELLA, a/k/a Matts
X JERRY D'AVANZO
MICHAEL DE LUCA, a/k/a Mikey Junior
ANTHONY DE MATTEO, a/k/a Apples
X JOHN LOTERZO, SR., a/k/a Mixed-up. Junior
PASQUALE MACCHIROLE, a/k/a Patty Mack
BARIO MASCHETTI, a/k/a Bari
X ANTHONY MASCUZZIO
JAMES V. NAPOLI, SR., a/k/a Jimmy Nap
JAMES NAPOLI, JR., a/k/a Junior and Lefty
X FRANK PINTO
X CARMINE PIRONE
HENRY RADZIEWICZ
X ROCCO RICCARDI, a/k/a Rocky
KENNETH ROSSI
X EUGENE SCAFIDI, a/k/a Bo and Luigi
JOSEPH SIRIGLIANO, a/k/a Joe Black
SABATO VIGORITO, a/k/a Sal
ROBERT VOZZO, a/k/a the Kid

DEFENDANTS

ATTORNEYS

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NY NY 947-6147

Did

Fine,

Clerk

Mar

Att

Cor

W

CASH

NAME

PE 6-7007

Ps Notice of Appeal filed

Notice of Appeal

5 — 5 + C's Grand Carrara

DATE	PROCEEDINGS
5/1/75	Before NEAHER,J.- Indictment filed and ordered sealed by the court bench warrants ordered for 11 defendants
5/7/75	Before MISHLER, CH.J. - Case called- Indictment ordered unsealed by the Court- Deft ANNARUMO present without counsel- bail set at $50,000.00 P.R Bond- Pleading set for 5/16/75 at 11:00 A.M.- Deft CARRARA present with counsel-deft arraigned and enters a plea of not guilty- Bail set at $50, P.R. Bond- Deft CASSELLA present without counsel - bail set at $50,000 P.R. Bond- Pleading set for 5/16/75 at 11:00 A.M.- deft DE LUCA present without counsel - Pleading set for 5/23/75 at 9:30 A.M.- Bail set at $50,000 P.R. Bond- deft MACCHIROLE and counsel present- deft arraigned a enters a plea of not guilty- Bail at at $60,000 surety- deft's house as

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DATE	PROCEEDINGS
	~~set for 5/16/75~~ at 11:00 A.M.-Bail set at $50,000 P.R. Bond for deft Napoli Jr. and $50,000 secured ~~by his~~ home or $2,~~500~~ cash deposit as to deft Napo Sr.-Deft PINTO present without counsel -bail set at $50,000.00 P.R. Bond and assignment of counsel Pleading set for 5/16/75 at 11:00 A.M. -Deft VIGORITO present without counse and assignment of counsel bail set at $50,000.00 P.R. Bond- Pleading set for 5/16/75 at 11:00 A.M. Pretrial conference set for 8/1/75- Trial set for 8/4/75
5/7/75	Notice of appearance filed(MACCHIROLE)
5/7/75	Notice of appearance filed(CARRARA)
5/8/75	Before MISHLER, C H.J.- Case called- Deft LOTRIENZO present with counsel Bail set at $50,000.00 P.R. Bond- Pleading and assignment of counsel adjd to 5/23/75 at 9:30 A.M.-Deft ROSSI present without counsel-bail set at $50,000 P.R.Bond-Pleading and assignment of counsel set for 5/16/75 at 11:00 A.M.
5-14-75	By SCHIFFMAN Mag. - Order for acceptance of cash bail filed. (Napoli Sr.)
5/16/75	Notice of appearance filed-(ANNARUMO)
5-16-75	Before MISHLER, CH J - case called - deft NAPOLI Sr. present without counsel - court enters a plea of not guilty on his behalf - case adjd to June 6, 1975 for assignment of counsel - deft PINTO present without counsel. Court enters a plea of not guilty on his behalf. Defts ANNARUMO, CASSELLA, NAPOLI Jr & ROSSI present with attys - defts arraigned and each on his own behalf enter pleas of not guilty - pleading as to deft VIGORITO adjd to May 28, 1975 at 9:30 am.
5-16-75	Five (5) Notices of Appearance filed (defts. ANNARUMO, CASSELLA, RADZIEWICZ, ROSSI & NAPOLI JR.)
5-19-75	Before MISHLER, CH J - case called - deft VOULO Present with atty deft arraigned and enters a plea of not guilty - bail set at $50,000 P/R Bond - case set down for June 6, 1975 for deft to retain new counsel (VOULO)
5/20/75	Before MISHLER, CH.J.- Case called- Deft MASCUZZIO and counsel present-Deft arraigned and enters a plea of not guilty- bail set at $50,000.00 P.R. Bond Trial set for 8/4/75- Deft PIRONE not present with counsel- Deft MASCITTI present-Court assigned Legal Aid as counsel for deft Mascitti- deft arraig and enters a plea of not guilty- bail set at $50,000.00 P.R. Bond
5/20/75	Financial affidavit filed (MASCITTI)
5/20/75	Notice of appearance filed (MASCUZZIO)
5-20-75	Before MISHLER, CH J - case called - at 2:15 PM in the Chambers of Ch.J. Mishler and in the presence of Mr. Fred Barlow, Special Atty and Martin Adler, deputy clerk, the following documents were unsealed: 72-J-1:1A, 1B and 1C; 73-W-1: 1A and 1B; 73-R-1: 1A and 1B; 73-B-3: 3A,3B,3C and 3D.

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DATE	PROCEEDINGS
	73-B-4: 4A, 4B and 4C; 73-N-1: 1A, 1B, 1C and 1D.
5/21/75	Before MISHLER, CH.J.- Case called- Deft ALTESE present with counsel
	defts D'AVANZO and DiMATTEO present without counsel- Deft VIGORITO
	present with counsel- Deft PIRONE present without counsel- Deft VIGORI
	arraigned and enters a plea of not guilty- Deft ALTESE arraigned and
	enters a plea of not guilty- Bail set at $50,000.00 P.R. Bond- All mo-
	tions extended to 6/20/75- Bail set at $50,000.00 P.R. Bond as to deft
	D'AVANZO and pleading adjd to 6/6/75 at 10:00 A.M.- Bail set at $50,0(
	P.R. Bond as to defts DiMATTEO and PIRONE and Court to assign counsel
	both defts
5/21/75	Notices of appearances filed (2) (ALTESE and VIGORITO)
5/2 /75	Notice of appearance filed(DiMATTEO)
5/27/75	Notice of appearance filed(NAPOLISSR.)
5-27-75	Before MISHLER, CH J - case called - deft De Luca present with
	counsel Albert Brackley - deft arraigned and enters a plea of
	not guilty - Aug. 4, 1975 for trial.
5-27-75	Notice of Appearance filed (MICHAEL DE LUCA)
5-27675	By MISHLER, CH J - Order apptg counsel filed for deft PIRONE.
5-27-75	By MISHLER, CH J - Order apptg counsel filed for deft DI MATTEO.
6/6/75	Before MISHLER, CH.J.- Case called- Deft Voulo present without counsel-
	Court to assign counsel for deft-Deft Riccardi present with counsel-Deft
	Scafidi and Lotiezo and Pinto present without counsel-Deft Riccardi
	arraigned and enters a plea of not guilty Case adjd to 6/20/75 for plea
	and assignment of counsel as to deft Scafidi- Court to appoint counsel
	for deft Lotiezo and Pinto- Court enters a plea of not guilty on behal
	of defts Lotiezo and Pinto-Bail set at $50,000.00 P.R. Bond as to deft
	Riccardi and Scafidi-Defts Di Matteo and counsel present-Deft arraigne
	and enters a plea of not guilty- Deft Pirone present- counsel not pres
	Court enters a plea of not guilty as to deft Piron-Pretrial confrrence
	set down for 7/18/75 at 2:00 P.M. Also for all motions-Deft D'Avanzo
	present-without counsel- Deft arraigne and the Court enters a plea of
	not guilty on behalf of deft-Court to assign counsel for deft-
6/6/75	Notices of appearances filed(NAPOLI JR, RICCARDI, NAPOLI SR.)
6/6/75	Stipulation of substitution of counsel filed(NAPOLI JR.)
6/11/75	By MISHLER, CH.J.- Order filed that deft James Napoli Sr. be given
	leave to travel on 6/14/75 to Nassau in the Bahamas and to return on
	6/21/75
	(O.K.R.)

DATE	PROCEEDINGS
/17/75	By MISHLER, CH.J.- Orders (4) appointing counsel filed(D'AVANZO,PINTO LOTIERZO and VOULO)
-19-75	Govts motion to dismiss pre trial motions of deft ROSSI filed.
19-75	Before MISHLER, CH J - case called - deft not present - application by AUSA Barlow for a bench warrant as to deft SIMONELLI - bail set at $50,000 surety company bond = bench warrant ordered for deft SIMONELLI.
/20/75	Bench warrant issued (SIMONELLI)
/20/75	Notice of motion for severance filed- ret/ 7/11/75 (PASQUALE MACCHIROLE)
/20/75	Before MISHLER, CH.J.- Case called- Deft Scafidi and counsel present- court appointed Arnold Walloch as counsel for deft with conditions as indicated on record-
6/20/75	Financial affidavit filed(SCAFIDI)
6/20/75	By MISHLER, CH.J. - Order apointing counsel filed(SCAFIDI)
6/20/75	Notice of appearance filed(PASQUALE MACCHIROLE)
-30-75	By MISHLER, CH J - Order on stipulation filed that Saxe, Bacon & Bolan, attys for deft Macchirole by Michael Rosen, Esq. that David Abrahamson, M.D. 1085-5th Avenue, NYC. be appointed to examine the deft to determine his physical, emotional & mental condition, etc. and that a report in writing be sent to the court, etc.
-2-75	Supplemental affidavit filed in support of pre trial motions(defts DeLUCA & LEVIN)
7/8/75	Letter from Richard W. Hannah to chambers and reply of Judge Mishler filed
7/10/75	Notice of motion directing U.S. Atty to make available testing results, dated of intercepted conversations, etc. filed ret. 7/18/75(LOTIERZO)
7/10/75	Letter from Michael Rosen dated 7/8/75 filed
7/11/75	Before MISHLER, CH.J.- Case called- motion for severace adjd to 7/18/75 (PASQUALE MACCHIROLE)
-7-16-75	Notice of Motion filed, ret, July 18, 1975, for Discovery, Bill of Particulares, etc (deft DI MATTEO)
7/18/75	Notice of motion for bill of particulars filed -memorandum of law filed ret. 7/18/75 at 2:00 P.M. (NAPOLI SR)
7-18-75	Before MISHLER, CH J - case called on motion for severance (Macchirole) motion submitted - decision reserved.
7-18-75	Notice of Appearance filed (SALVATORE ANNARUMMO)
7-18-75	Before MISHLER, CH J - case called - deft SCAFIDI & counsel present-deft arraigned and enters a plea of not guilty - bail conditions contd - Pre Trial Conference held as to all defts - motions for discovery were granted and denied in part as indicated on the record - pre trial

DATE	PROCEEDINGS
11/7/75	Before MISHLER, CH.J.- Case called- deft and counsel not present- motion for permission to travel adjd to 11/21/75 (NAPOLI JR.)
11-14-75	Govts motion to condition discovery filed.
11-17-75	By MISHLER, CH J - Order filed deft James V.Napoli Sr., is given permission to travel on Nov. 18, 1975 to Las Vegas, Nevada and to return to his home on or before Nov. 23, 1975.(order signed 11-14 but received and filed in Clerks Office on 11-17-75)
11/21/75	Before MISHLER CH.J. - Case called- motion adjd to 12/5/75 of deft atteso for discovery motion for deft Napoli,Jr. to travel, etc. argued motion granted on condition s made by court as indicated on record- order to be submitted
11/26/75	By MISHLER,CH.J- Memorandum of Decision and Order filed dismissing counts 1,2,6 and 7 of the indictment to all defts named in those counts-motions for additional particulars denied-decision on motions relating to electroni surveillance of defts reserved pending hearing prior to trial-all other motions including requests for leave tomake further pre-trial motions are denied
11/28/75	By MISHLER, CH.J.-Order filed extending bail limits of deft Napoli Jr. for limited purposes as stated in order
12-5-75	Before MISHLER, CH J - case called - motion to condition discovery - motion argued - discovery granted in part and denied in part as indicated on the record - further pre trial conference set down for 12-19-75 at 4:00 PM.
12-5-75	XXXXXXXX BY MISHLER, CH J - Memorandum of Decision and Order filed denying motion of gov't requiring disclosure by defts of certain portions of intercepted communication, etc.
12-10-75	Letter filed received from Chambers from AUSA Fred Barlow, Special Attorney (pre trial conference set for Dec. 19, 1975 at 4:00 PM and trial date July 1976, etc.)see letter for details
12/15/75	Govt's bill of particulars filed filed
12-16-75	Letter filed received from Chambers from Michael Riccardelli re deft Rossi re waiving of rights to Speedy Trial and agrees to have his case tried in July, 1976.
12/16/75	Letter from Marshall Kapkan dated 12/10/75 that deft Robert Voulo waives right to speedy trial filed
12/16/75	Letter from A.U.S.A. Barlow and accompanying report of Dr. Abrahamsen fil
12/19/75	Waiver of speedy trial filed(FRANK PINTO)
12/19/75	So [illegible] filed.
12/19/75	[illegible] filed. (... [illegible] fold!

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DATE	PROCEEDINGS
	conference to be contd without date.
7-18-75	Before MISHLER, CH J -case called - motion of deft Frank Altese for Immunization - motion argued - granted and denied in part as indicated on the record.
8-22-75	Govts Memorandum in opposition to motion of deft Napoli,Sr. to dismiss Indictment and for Bill of Particulars.
8-25-75	By MISHLER, CH J - Order filed extending travel limits as to deft NAPOLI Sir. (for leave to travel on August 27, 1975 to Las Vegas, Nevada and to return to his home on Aug. 31,1975.
9-3-75	Bench warrant retd and filed - executed (Simonelli)
9-3-75	Before MISHLER, CH J - case called - deft SIMONELLI produced in court on a bench warrant - counsel not present - court to appoint counsel - bail set at $50,000 P/R Bond - Sept. 5,1975 at 9:30 am for pleading - Bench Warrant vacated.
9-3-75	Copy of letter filed dated 9-3-75 received from Chambers re appointment of counsel for deft SIMONELLI.
9-3-75	By MISHLER, CH J - Order apptg counsel filed (SIMONELLI)
9/5/75	Before MISHLER, CH.J.- Case called- Deft JOSEPH SIMONELLI and counsel present-Deft arraigned and enters a plea of not guilty-bail conditions contd
9/10/75	75 M 1111 is inserted in CR file
10-9-75	By MISHLER, CH J - Order filed that the travel limits established in the Personal Recognizance Bond given by deft James V.Napoli, Sr. on May 8, 1975, are extended to include the Districts of New Jersey, for the purpose of social visits to relatives residing in New Jersey, (two letters filed re Order of Judge received with Order from Chamber
10-14-75	Defts Reply Memorandum filed (Napoli, Sr)
10-21-75	Notice of Motion filed for Discovery and Bill of Particulars and Affidavit in support thereof(received from Chambers & retd to Chambers)
10-22-75	Appendix filed (received from AUSA Barlow and forwarded to Chambers as directed) to be annexed to Govts memorandum in opposition to deft Napoli's motions etc.
10/23/75	Letter from Max Wild dated 10/23/75 and accompanying copy of request for discovery and inspection filed
10/29/75	Notice of readiness for trial filed
10-31-75	Affidavit in opposition to motion to extend bail limits (James Napoli, Jr.) filed.

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DATE	PROCEEDINGS
12/19/75	Before MISHLER,CH.J.- Case called- pre-trial conference held-defts Altese,Moscuzzio,Mapoli Sr, Pinto,Riccardi,Rossi and Voulo waive rights to speedy trial in writing- defts Ammaramo,Carrara,D'Avanzo,DiMatteo,Mosciutti, Pirone, Scafidi and Vigorito waive reights to speedy trial on record- deft Cassella,Deluca,Lotierzo,Macchirloe,Napoli Jr and Redziewicz not present-deft Simonelli does not waive right to speedy trail -trial date for deft set for 12/22/75 at 10:00 A.M.- bail limits extended to N.J. a Conn as to deft Carrara on his motion - conferece concluded-
12/19/75	Certificate of engagement filed
12/22/75	Before MISHLER,CHJ.J- Case called- Deft Semonelli and counsel present Deft waived his right to a speedy trial-Trial date set for 7/6/76
12/22/75	Letter dtd 12/17/75 filed from E. Zampella to J. Mishler re: deft waives his rights to a speedy trial,etcc. (Martin Casella)
12/23/75	Govt's notice of appeal from order of 11/26/75 dismissing cts. 1 and 2 filed
12/23/75	Docket entries and duplicate of notice of appeal mailed to court of appeals
12/24/75	By MISHLER, CH.J.- Memorandum of Decision and Order filed denying mot to sever(EUGENE SCAFIDI)
12/29/75	Waiver of speedy trail filed (NAPOLI JR)
12/31/75	Affidavit of Albert Brackley and waiver of speedy trial filed(DELUCA)
1/12/76	Record on appeal certified and mailed to court of appeals
1-13-76	Mandate received from the Court of Appeals that record be filed ~~ARGUED~~ on or before Jan. 26, 1976(
1/13/76	Financial affidavit of deft Riccardi filed
1-14-76	By Mishler, Ch J - Order apptg counsel filed (Rocco Riccardi)
1-14-76	By Mishler, CH J - Order filed pursuant to 18:2518(8)(a) that the original tape recording of 4-28-73, which was unsealed and removed for purposes of trial in related case 75 CR-342 on 11-4-75, be and hereby is returned to the box of tape recordings sealed by Judge Bartels on May 3, 1973, and the said box is resealed.
1-14-76	Acknowledgment received from the Court of Appeals filed for receipt of Index on Appeal.
1-21-76	75 M 1518 inserted in CR File.
1-29-76	Memorandum to all Counsel filed dated Jan. 28, 1976 from Fred Barlow, Special Atty.Organized Crime Section(recvd from Chambers)

DATE	PROCEEDINGS
1-29-76	Notice of Motion filed for suppressing evidence, etc. & Memorandum of Law filed in support of deft Mascitti's motion etc.
2/6/76	Before MISHLERÇÇH.J.- CAse called- motion to suppress argued- decision reserved
2/23/76	By MISHLER,CH.J.- Memorandum of Decision and Order filed denying deft Mascitti's motion to suppress
/24/76	Letter from A.U.S.A. Barlow dated 2/19/76 filed
/27/76	By MISHLER,CH.J.- Order filed unsealing tape recordings, for the purpose of duplication-tapes to be resealed after duplication, etc.
3-3-76	Letter filed received from Chambers dated 3-2-76 to Dominick DiCarlo and Certificate ofEngagement filed.
3-3-76	By Mishler, Ch J - Order filed appointing counsel for deft Robert VCULO
3-5-76	By MISHLER, CH J - Order filed extending bail limits of deft JAMES NAPOLI Sr., for leave to travel on March 18, 1976 to Las Vegas Nevada and to return to his home on or before March 25, 1976.
3-10-76	Stipulation filed that $1,082 in currency seized from SABATO VIGORITO on May 7, 1975, having been returned to him, that SABATO VIGOROTO hereby waives any objections as to authenticity and the best evidence rule concerning the admission of copies of said currency, but that Sabato Vigoroto reserves all other objections as to the admissibility of said copies of currency.
3-17-76	By MISHLER, CH J - Amended order filed rad deft Napoli Sr. given leave for deft to travel on March 18, 1976 to Puerto Rico and to return to his home on or before March 25, 1976.
3-24-76	Voucher for compensation of counsel filed (Robert Vuolo)counsel Marshall Kaplan,Esq.
4/27/76	Notice of motion to suppress ~~fi~~ and memorandum of law filed (NAPOLI SR)(5-17-76) (entered 76 CR 62)
4-28-76	Motion to consolidate suppression motions and hearings (with 75 CR-342, 75 CR-343 and 76 CR 62) with affidavit in support of motion filed (ret. May 7 at 12 Noon)
5/7/76	Befre MISHLER,CH.J.- Case called- deft and counsel present- motion to consolidate all suppression hearings argued- decision reserved
5/10/76	Affidavit of Gustave Newman and ~~memorandum~~ filed
5/10/76	Notice of motion to suppress filed- (DI MATTEO)
5-12-76	Supplemental Memorandum of Law filed submitted by deft James V.Napoli Sr. in support of motion to suppress fruits of electronic surveill[illegible]
5-13-76	Notice of motion filed for suppressing evidence (Vigorito)

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DATE	PROCEEDINGS
5/18/76	Notice of motion to suppress filed(NAPOLI, JR.)
5/21/76	Copy og letter from Anthony Crecca dated 5/19/76 filed
6-1-76	Notice of motion filed requesting the Govt to provide defense counsel with Court orders, etc.
6-1-76	Letter of May ~~22~~ 27, 1976 filed received from Chambers from Micahel Ira Asen, counsel for deft Bario Mascitti(retd to Chambers as directed)
6-4-76	Letter filed received from Chambers dated June 2, 1976 re deft Pasquale Macchirole from Michael Rosen, counsel for deft.
6/9/76	Letter from Gustave Newman dated 5/21/76 filed
6/9/76	Letter from A U.S.A. Barlow dated 11/17/75 filed
6/9/76	Letter from Max Wild dated 11/19/75 filed
6/9/76	Affidavit of Max Wid filed
6/15/76	Copy of letter from Judge Mishler dated 6/14/76 to counsel filed
6-16-76	Notice of motion filed as to deft Riccardi for Bill of Particulars and Discovery. (ret. June 17, 1976)
6-17-76	Supplemental Memorandum of Law filed on behalf of deft James Napoli Sr Affidavit of RAPHAELA PASCOCELLO filed; Govts Memorandum opposing motions to suppresss surveillance evidence filed ; Govts Affidavits and Analysis filed (all recvd from Chambers & retd as requested)
6-17-76	By MISHLER, CH J - Order filed that the following Clerks of Court deliver by June 23, 1976, to the Chambers of Hon.Judge Mishler, for unsealing, the following Orders: etc. 1.District of New Jersey; April 10, 1970, Hon. Anthony Augelli, etc. 2. Southern District of NY: May 18, 1970: Hon. Thomas F.Croake etc.
6-17-76	Before MISHLER, CH. J. - Case called. Defts D'Avanzo, DiMatteo, Napoli Sr., Semonelli & Vigonito present. All counsel present, except for Mr. Passalacqua & Mr Francanero. ~~Trial~~Final pre-trial conference held. Motion by deft Radziewicz for a severance from the trial is granted. Audibility hearing held as to deft Innarumo and concluded. Pre-trial conference to continue on 6-30-76 at 10AM.
6-17-76	By MISHLER, CH. J. - Order appointing counsel for Frank Altese et al filed
6-17-76	Financial affidavit of Richard A. Bascetta filed.
6-23-76	Notice of motion and affidavit filed, ret. July 2, 1975, for an order suppressing evidence, etc.
6-24-76	Letter filed received from Chambers dated June 23 from Gustave Newman and copy of Second Circuit's decision in U.S. v. Giganti.etc.

DATE	PROCEEDINGS
6-24-76	By MISHLER, CH J - Order filed that James Napoli, Sr. one of the defts in this case, in accordance with the P.R.Bond given by said deft on May 8, 1975, given leave to travel on June 25, 1976 to Las Vegas, Nevada and to return to his home on or before June 28, 1976.
6-29-76	Before NEAHER, J. - Superseding Indictment filed.
6-29-76	Govt's memorandum in opposition to defts' motion to suppress filed.
6-30-76	Memorandum of Law filed of Rocco Riccardi in support of motion to suppress oral interception orders, etc.
6-30-76	Before MISHLER, CH. J. - Case called. Defts Napoli Sr & Napoli Jr present with counsel. Hearing held as to the question of standing. On motion of deft Macchirole and on consent of the Govt the deft is severed from the trial. Both sides rest in the hearing. Hearing concluded. Hearing held on the sealing of the tapes. Hearing concluded. Minimization hearing held. Minimization hearing concluded. Decision reserved on all three hearings. Pretrial hearings continued to 7-1-76 at 10 A.M.
6-30-76	Notice of appearance for James Napoli Jr. filed.
7-1-76	Affidavit of ARNOLD WALLACH filed.(atty for deft Scafidi)
7-2-76	Before MISHLER, CH. J. - Case called. Defts DeMotteo & Vigonito present. Counsel Mr Hannah, Mr Borstein, Mr Wild, Mr Adler, Mr Wallach & Mr Asen present. Hearing on minimization & sealing as to 309 tapes held. Hearing continued to 7-2-76 at 2 P.M.
7-2-76	Record on appeal received from C of A. Acknowledgment mailed to Clerk.
7-6-76	Before MISHLER, CH. J. - Case called.All defts present with counsel except for defts Macchirole & ~~Rodriguez~~ Radziewicz All defts arraigned except for defts Macchirole & ~~Rodriguez~~ Radziewicz & each enters a plea not guilty to the superseding indictment. Defts Macchirole & ~~Rodriguez~~ Radziewicz severed for the trial Trial ordered & begun. The jury was selected and sworn in. The Court severed counts 1, 5 & 6 of superseding indictment.. Counts are renumbered as follows for the purpose of the trial. Count 2 will be count 1, count 3 will be count 2, count 4 will be count 3 and count 7 will be count 4. Trial continued to 7-7-76 at 10 A.M(EXCXUEXDXXXXDXXXX (EXCLUDABLE DELAY: Code 1: Start 7-6-76for Macchirole & Rodriguez)
7-6-76	By MISHLER, CH. J. - Voucher for compensation for expert services filed.
7-2-76	Before MISHLER, CH. J. - Case called. Hearing on Mimimization & sealing continued. Hearing concluded. All the motions made to suppress are deni
7-7-76	~~Before MISHLER, CH J. - Case called - all defts & counsel present. T~~ resumed. Trial continued to 7/8/76 at 10:00 a.m.

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Docket Entries All

DATE	PROCEEDINGS
7-9-76	By MISHLER, CH. J. - Immunity order for Richard A. Bascetta filed.
7-9-76	By MISHLER, CH. J. - Order dtd 7-9-76 that Richard A. Bascetta is committed to the custody of the Attorney General for the life of the trial of this case, or for six months, or until such time as he purges himself of this contempt, whichever event occurs first filed. (copies to US Marshal, Probation & US Atty).
7-9-76	Before MISHLER, CH. J. - Case called. All defts & counsel present. Deft Pinto not present on consent. Trial resumed. Trial continued to 7/12/76 at 10:00 a.m.
7-12-76	Voucher for Expert services filed (Scafidi & Mascitti-Ilene Ginsberg, Court Reporter)
7-12-76	Before MISHLER, CH J a- case called - all defts & attys present - trial resumed -Trial contd to 7-13-76
7-13-76	Before MISHLER, CH J - case called - all defts & attys present - trial resumed - Hearing held on motion to suppress as to deft RICCARDI - motion denied - hearing concluded - trial contd to July 14, 1976
7/14/76	Before MISHLER, CH. J. - Case called. All defts & Counsel present. Tri. resumed. Trial continued to 7/15/76 at 10:30 a.m.
7/15/76	Before MISHLER, CH. J. - Case called. All defts & Counsel present. Trial resumed. Trial continued to 7/19/76 at 10:00 a.m.
7/16/76	Voucher for Export or Other Services filed.
7-19-76	By MISHLER, CH J - Order filed that Joseph Mustacchio answer all questions directed to him during the trial in this case and further ordered that Joseph Mustacchio shall not be excused from testifying or producing books, papers, etc. Ordered that no testimony or other information compelled under this order may be used against Joseph Mustacchio(see order as indicated)
7-19-76	By MISHLER, CH J - Order filed that Joseph Mustacchio is in direct contempt of this court for his failure to answer questions before the court and is hereby committed to the custody of the Atty.General of the U.S. for the life and trial of this case or for 6 months, or until such time as he purges himself of this contempt, whichever event occurs first; the place of confinement shall be the Metropolitan Corr. Center, NY.
7-19-76	Before MISHLER, CH J - case called - all defts & attys present - trial resumed - court signed immunity order as to Joseph Mustacchio- Witness Mustacchio refused to testify and the court held him in

DATE	PROCEEDINGS
	contempt - witness Mustacchio sentenced to imprisonment for 6 months or until verdict in the case on trial, whichever comes first. Execution of sentence stayed until 3 PM this day, - trial contd to 7-20-76
7/20/76	Order returned & filed. Witness deliverdd to MCC on 7/19/76 filed.
7/20/76	Before MISHLER, CH. J. - Case called. Add defts & Counsel present. Trial resumed. Trial continued to 7/21/76 at 10:00 a.m.
7/21/76	Before MISHERL, CH. J. - Case aalled. All defts & Counsel present. Trial res mTrial continued to 7/22/76 at 10:00 a.m.
7-22-76	Before MISHLER, CH J - case called - all defts & counsels present - trial resumed - Motion by deft DE LUCA for severandeadd for mistrial. is denied - trial contd to July 26, 1976 at 10:00 am
7/26/76	Before MISHEER CH. J. - Case called. All defts & Counsel present. Trial resumed. Trial continued to 7/27/76 at 9:30 a.m.
7-27-76	Before MISHLER, CH J - case called - all defts & counsels present - trial resumed - trial contd to 7-28-76
7/28/76	Boucher for compensation for expert services filed & copies distributed accordingly. (FRANK ATESE)
7-28-76	Before MISHLER, CH J - case called - all defts & counsels present - trial resumed - Trial contd to 7-29-76 at 9:30 am.
7-29-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - Trial contd to July 30, 1976.
/30/76	Before MISHLER, CH. J. - Case called. Deft &Counsel present. Trial resumed. Trial continued to 8/2/76 at 10:00 a.m.
8/2/76	Before MISHLER, C H. J. - Case called. Defts & Counsel present. Trial resume Trial continued to 8/3/76 at 10:00 a.m.
8-3-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - Trial contd to 8-4-76.
8-4-76	By Mishler, Ch J - authorization for expert services filed (Di Matteo)
8-4-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - trial contd to 8-5-76.
8-5-76	Before MISHLER, CH J - case called - defts & counselspresent - trial resumed - trial contd to 8-9-76.
8-9-76	Voucher for compensation for expert services filed (Scafidi & Moscitti)
8-9-76	Before MISHLER, CH J - case called - deft & counsel present - trial resumed - Trial contd to 8-10-76
-10-76	Before Mishler, Ch J - case called - defts & counsels present - trial resumed -Motion by all defts for mistrial is denied - trial contd to 8-11-76.

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DATE	PROCEEDINGS
8/11/76	Memorandum of Law and argument for Salverio Carrara filed.
8/11/76	Before MISHLER, CH. J.- Case called. Defts & Counsel present. Trial resumed. Government rests. Trial continued to 8/12/76 at 9:30 a.
8-12-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - motion argued by all defts for judgment of acquittal etc. the court dismissed count #7 of the superseding indictment - court 4 is dismissed as to defts CASSELLA & ANNARUMO. The superseding indictment is dismissed on motion of defts as to ALTESE, CASSELLA, PINTO, PIRONE, ROSSI & SEMONELLI. Defts as stated aredischarged, by the court. Motion by remaining defts for judgment of acquittal is denied ; defts AMMARUMO, CARRARA, D'AVANZO, DeLUCA, DI MATTEO, LOTIERZO, MASCITTI, MASCIZZIO, NAPOLI Sr., NAPOLI Jr. RICCARDI, SCAFIDI, VIGORITO & VOULO rest. Trial contd to 8-13-76 as to the continued ruling of request to charge.
8-12-76	BY MISHLER, CH J - Order of dismissal filed as to defts. ALTESE, CASSELLA, PINTO, PIRONE, ROSSI & SEMONELLI.
8/13/76	Before MISHLER, CH. J. - Case called. Counsel for defts Carrara, DiMatteo, Lotierzo, Mascitti, Napoli Sr. Napoli Jr., Riccardi, Scafidi & Voulo present. Defts not present. Court ruled on Governments request to charge. Trial continued to 8/16/76 at 10:00 a.m.
8-16-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - Juror #2 excused because of illness - Govt sums up - trial contd to 8-17-76 at 9:30 am.
8-17-76	Before MISHLER, CH J -Case called - defts & attys present - trial resumed - defts LOTIERZO, VOULO, VIGORITO, SCAFIDI, RICCARDI, JAMES NAPOLI JR. ,MOSCITTO sum up - trial contd to 8-18-76.
8-18-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - all defts sum up - trial contd to 8-19-76 @ 9:30am
8-19-76	Before MISHLER, CH J - case called - defts & counsels present - Jury #2 excused - Judge charges Jury - alternates discharged - Marshals sworn - Jury retires to deliberate at 12 Noon - Order of sustenance signed - Jury returns at 1:30 PM to hear testimony read back - Jury resumes deliberations at 1:40 PM - Jury returns at 3:15 PM to hear testimony - jury resumes deliberations at 3:30 PM-2 Jury Notes marked Court Ex. 22 and 23- Jury note marked court Ex.24 - jury returns at 5:40 PM to hear testimony - Jury resumes deliberations at 6:05 PM - trial contd to 8-20-76 at 9:30 am

DATE	PROCEEDINGS
8-19-76	By Mishler, Ch J - Order of sustenance filed.
8-20-76	2 vouchers for compensation for expert services filed.(Semonelli and Mascitti)
8-20-76	By Mishler, Ch J - Order of sustenance filed (Lunch)
8-20-76	Before MISHLER, CH J - case called - defts & attys present - trial resumed - Jury resumes deliberations at 9:30 am - Jury returns at 1:30 PM ~~and~~ to hear tapes - jury resumes deliberations t 2:25 PM Jury returns at 3:20 PM to hear tapes. Jury resumes deliberations at 3:25 PM. Deft RICCARDI's motion for mistrial denied - Jury returns at 3:45 PM and renders verdict of not guilty on count 1 as to defts ANNARUMO & D'AVANZO - Judgment of acquittal ordered as to both defts - Jury resumes deliberations at 3:50 PM - Jury returns at 3:52 to hear tapes - Jury resumes deliberations at 4:20 to hear tapes - Jury resumed deliberations at 4:30 PM - etc. trial contd to 8--23-76 at 9:30 am.
8-20-76	By Mishler, Ch J - Judgment of acquittal filed as to defts ANNARUMO and JERRY D'AVANZO.
8-23-76	Before MISHLER,CH. J. - Case called. Defts & counsel present. Trial resumed. Jury deliberations continued. Jury returned to hear tapes. Jury resumes deliberations. Trial continued to 8-24-76 at 9:30 A.M.
8-23-76	By MISHLER,CH. J. - Order of sustenance filed.
8-24-76	Before MISHLER, CH J -case called - defts& counsels present - trial resumed - Jury resumes deliberations at 9:30 am- Jury returns with a verdict at 2:30 PM as follows: guilty on count 1 as to defts SCAFIDI and VOULO; on count 3 guilty as to defts DI MATTEO, MASCITTI,SCAFIDI & VOULO; NOT GUILTY as to DEFT RICCARDI; on count 4 guilty as to defts CARRARA, DE LUCA, DI MATTEO, MASCITTI, JAMES NAPOLI SR. JAMES NAPOLI JR. VIGORITO ; not guilty as to defts LORIERZO,MASCUZZIO & VOULO: Jury polled and discharged - trial concluded; Judgment of Acquittal ordered as to defts RICCARDI, LOTIERZO & MASCUZIO; adjd without date for sentencing as to all other defts - bail contd.
8-24-76	By Mishler, Ch J - Order of sustenance filed (Lunch)
8-24-76	Memorandum of Verdict filed.
8-24-76	31 stenographers transcripts filed (dated July 6th, 7th, 8th, 9th, 12th, 13th, 14, 15, 19, 20, 21, 22, ~~23~~ 26, 27, 28, 29, 30, 1976; August ~~1~~ 2, 3, 4, 5, 9, 10, 11, 12, 13, 16, 17, 18, 20 and 23, 1976)
8-25-76	By MISHLER, CH J - Order filed that RICHARD BASCETTA & JOSEPH MUSTACCHIO be released from the custody of the Attorney General of the U.S. upon the signing of this Order. Certified copies to Marshal.

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DATE	PROCEEDINGS
8-27-76	Letter filed addressed to Max Wild, Esq. counsel for deft James Napoli Sr. received from Chambers with Order of 8-26-76 signed by Judge Mishler indicating bail limits of the deft is extended to the State of F[illegible] for the period from 8-27-76 to 8-30-76. (Letter and Order retd to Chambers as directed.)
8-27-76	Two vouchers filed for compensation for expert services filed (one re deft Bario Mascitti & one re deft Eugene Scafidi)
8-27-76	By MISHLER, CH J - Order filed pursuant to 18:2518(8((a) that the tape recordings made pursuant to this Court's orders of Dec. 8, 1972 (72-J-1), Jan. 15, 1973 (73-W-1), Fey. 20, 1973 (73-R-1); April 12, 1973 (73-B-3) and May 3, 1973 (73-B-4) be resealed and that these tape recordings and thosemade pursuant to this Court's order of May 24, 1973 (73-N-2) remain in the custody of the Federal Bureau of Investigation, New York Office, subject to further order of this Court.
8-30-76	Copy of Opinion and Order received from the court of appeals filed remanding action to said District Court for further proceedings in accordande with the Opinion , etc.
9/1/76	Two copies of order delivered to Warden of MCC N, for Release of defts on 8/25/76, filed.
9/14/76	Voucher for compensation filed. (ANTHONY DI MATTEO).
9/14/76	Stenographers transcript dated 8/19/76 filed.
9.14/76	Voucher for compesnation for expert services filed. (FRANK PINTO)
10-6-76	By MISHLER,J.-Order filed extending deft James Napoli's bail limits to Las Vegas until 10-11-76.
10-13-76	Notice of motion filed (deft Vigorito) for setting aside the conviction, ~~DENYING~~ dismissing count 3 of the indictment, arresting judgment, etc. (ret. Oct. 15, 1976)
10/13/76	Deft Carrar's memorandum in support of his motion for a new trial and/or judgment of acquittal filed.(SAVERIO CARRARA).
10-14-76	By MISHLER, CH J. - Memorandum of decision and order filed denying defts motion to suppress electronic surveillance evidence.(NAPOLI SR., DI MATTEO: VIGORITO, MASCITTI, VOULO, SCAFIDI, DE LUCA, CARRERA & NAPOLI JR.)
10-15-76	Before MISHLER, CH J - case called - deft DI MATTEO & counsel Richard Hannah present - ~~Imposition of sentence is suspended~~ on count 4 and deft is placed on probation for 3 years; notice of appeal to be filed without fee (remaining counts still open)

DATE	PROCEEDINGS
	Judgment & order of probation filed - certified copies to Probation (ANTHONY DI MATTEO)
0-15-76	Notice of appeal filed without fee (ANTHONY DI MATTEO)
0-15-76	Before MISHLER, CH J - case called - deft De Luca & counsel Albert Brackley present - deft sentenced to imprisonment for 3 years on count 4 - pursuant to 18:3651 - to serve 6 months and execution of remainder of sentence is suspended and deft is placed on probation for 30 months - deft to pay a fine of $10,000. Sentence & payment of fine stayed pending appeal. Bail conditions contd - deft advised of right to appeal. Deft VIGORITO & counsel Gustave Newman present - deft sentenced to imprisonment for 3 years on count 4 pursuant to 18:3651; deft to serve 6 months in a jail type institution and execution of remaining sentence is suspended and the deft is placed on probation for 30 months. Deft to pay a fine of $20,000. Sentence and payment of fine stayed pending appeal. Bail conditions contd - deft advised of right to appeal. Deft SCAFIDI & counsel Arnold Wallach present - deft sentenced to imprisonment on count 2 for a period of 3 years pursuant to 18:3651 - to serve 2 months and execution of remaining sentence is suspended and the deft is placed on probation for 34 months. Notice of appeal to be filed without fee . Sentence stayed pending appeal. Bail conditions contd. Deft NAPOLI JR. & counsel Thomas O'Brien present - deft sentenced to imprisonment for 3 years under 18:4205(b)(2) and to pay a fine of $20,000. Sentence and payment of fine stayed pending appeal. deft advised of right to appeal - bail conditions contd. Deft NAPOLI SR. & counsel Max Wild present - deft sentence to imprisonment on count 4 to 5 years pursuant to 18:4205(b)(2) and fine of $20,000. Sentence and payment of fine stayed pending appeal. Bail contd, deft advised of his right to appeal. Deft MASCITTI & counsel M.Asen present - motion for new trial denied - deft sentenced to imprisonment for 3 years under 18:3651 to serve 2 months and execution of remainder of sentence is suspended and deft placed on probation for 34 months. Sentence stayed pending appeal. Bail contd - Notice of appeal to be filed without fee. Deft VOULO & counsel Dominick Di Carlo & present. Deft sentenced to imprisonment on count 2 for 3 years pursuant to 18:3651 - to serve 2 months and execution of remainder of sentence is suspended and deft is placed on probation for 34 months. Deft advised of his right to appeal. Bail contd and sentence stayed pending appeal. Motion for judgment of acquittal is denied. Deft CARRARA & counsel

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DATE	PROCEEDINGS
	Salvatore Piazza present - deft sentenced to imprisonment on count 4 for 3 years under 18:3651 to serve 4 months and remainder of sentence is suspended and deft is placed on probation for 32 months . Deft to pay a fine of $5,000. Sentence and payment of fine stayed pending appeal. Bail conditions contd - deft advised of his rights to appeal. Remaining counts still are open as to all defendants.
10-15-76	Judgment & commitment and Order of probation filed for all defts stated above - Certified copies to Marshal and Probation.
10-15-76	Notice of appeal filed without fee (Defts BASCITTIX, SCAFIDI, AND ANTHONY DI MATTEO) Docket entries and duplicates of Notices of appeals forwarded to the court of appeals.
10-15-76	Case Called - Motion for an order granting arresting, argued and denied.
10-15-76	Case called - Case adjd without date for trial pending the Courts determinations as indicated on the record. Count 3 of indictment 75 CR 341 (S) is dismissed on motion by the govt. as to all defts charged.
10-19-76	Memo of Law - filed. Received from Chambers (James V. Napoli, Sr.
10-19-76	Three Stenoxgraphers Transcript dated 7-2-76, 7-1-76 & 7-2-76 -

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A18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-v-

FRANK ALTESE, a/k/a Frankie Feets
SALVATORE ANNARUMO
SAVERIO CARRARA, a/k/a Sammy Smash and Sammy
MARTIN CASSELLA, a/k/a Motts
JERRY D'AVANZO
MICHAEL DE LUCA, a/k/a Mikey Junior
ANTHONY DI MATTEO, a/k/a Apples
JOHN LOTIERZO, SR., a/k/a Mixed-up-Junior
PASQUALE MACCHIROLE, a/k/a Patty Mack
BARIO MASCITTI, a/k/a Bari
ANTHONY MASCUZZIO
JAMES V. NAPOLI, SR., a/k/a Jimmy Nap
JAMES NAPOLI, JR., a/k/a Junior and Lefty
FRANK PINTO
CARMINE PIRONE
HENRY RADZIEWICZ
ROCCO RICCARDI, a/k/a Rocky
KENNETH ROSSI
EUGENE SCAFIDI, a/k/a Bo and Luigi
JOSEPH SIMONELLI, a/k/a Joe Black
SABATO VIGORITO, a/k/a Sal
ROBERT VOULO, a/k/a the Kid

DEFENDANTS

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SUPERSEDING INDICTMENT

18 U.S.C. §§ 1962, 1963, 1510, 1955, 1952, 2, 371

75 CR 341 S

THE GRAND JURY CHARGES:

COUNT ONE

I. From on or about the 26th day of February, 1971, up to and including the date of filing of this indictment, within the Eastern District of New York and elsewhere,

A. the defendants FRANK ALTESE, SALVATORE ANNARUMO, SAVARIO CARRARA, MARTIN CASSELLA, JERRY D'AVANZO, MICHAEL DE LUCA, ANTHONY DI MATTEO, JOHN LOTIERZO, SR., PASQUALE MACCHIROLE, BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., FRANK PINTO, CARMINE PIRONE, HENRY RADZIEWICZ, ROCCO RICCARDI, KENNETH ROSSI, EUGENE SCAFIDI, JOSEPH SIMONELLI, SABATO VIGORITO AND ROBERT VOULO and

B. Vincent "Lefty" Barbuto, Richard "Shotgun" Boccetta, Vincent Cassese, Arthur Catenacci, Eugene Catenacci, Pasquale Di Sibio, Joseph Dorino, Ralph Ficarella, Francis Folan, Louis "Sonny" Franzese, John "Biggy" Garcia, Samuel Ginsberg, "Giamo", Joseph Giordano, Martin Griffin, Sr., Martin "Buddy" Griffin, Jr., Peter F. Guido, Walter Hines, Joseph Horn, Anthony Intermasso, Maurice Lichtman, Robert "Big Bob" Manse, John "Jumbo" Masci, Anthony Vincent Napoli, Ray Napolitano, Niel Nastro, Thomas Pecora, Joseph "Joey Pickles" Percella, "Pete", Ernest Pupola, Peter Renda, Joseph Tuseo, Frank Vassalo, Fred Vigorito, Gabriel Vigorito, Robert Vigorito, and Thomas Zito, named herein as co-conspirators but not as defendants,

II. wilfully and knowingly combined, conspired, confederated and agreed together with each other, and with other persons known and unknown to the Grand Jury,

III. to conduct and participate, directly and indirectly, in the conduct of an enterprise engaged in, and the activities of which affected, interstate commerce, through a pattern of racketeering activity and through the collection of unlawful debts, in violation of Title 18, United States Code, Sections 1962 (c) and 1963.

IV. It was part of the said conspiracy that the defendants and co-conspirators named above in paragraph I would operate, conceal and profit from a large-scale illegal policy and numbers gambling business.

V. It was part of the said conspiracy that:

A. The unindicted co-conspirators Conrad and other persons known and unknown to the Grand Jury would act as "runners", that is, they would accept policy bets from bettors and players and would enter these bets on "policy slips", that is, writings and papers reflecting said policy bets.

B. The defendants SALVATORE ANNARUMO and ANTHONY MASCUZZIO, the unindicted co-conspirators John E. Garcia, Peter F. Guido and other persons known and unknown to the Grand Jury would act as controllers; that is, they would receive directly and indirectly policy slips from runners and accumulate the policy slips in "bundles", that is, policy slips relating to each controller's runners.

C. The defendants JERRY D'AVANZO, ANTHONY DI MATTEO, DARIO MASCITTI, JOSEPH SIMONELLI, JOHN LOTIERZO, SR., SABATO VIGORITO, FRANK ALTESE, FRANK PINTO, CARLINE PIRONE, EUGENE SCAFIDI and ROBERT VOULO, the unindicted co-conspirators, Charles Gaudio and John Lotierzo, Jr. and other persons known and unknown to the Grand Jury would operate policy "banks" and offices", that is, they would receive directly and indirectly from controllers the bundles of policy slips relating to the controllers's runners, and would prepare "ribbons", that is, writings and papers reflecting the "hits", or winning numbers, and the "handle", or total bets, for each controller and runner, and would also prepare "master sheets", that is, writings and papers reflecting the amount of money owed to the policy gambling organization by controller, and the amounts of money to be paid to or collected by runners by controllers.

D. The defendants JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., MARTIN CASSELLA, MICHAEL DE LUCA, SAVERIO CARRARA, SABATO VIGORITO and PASQUALE MACCHIROLE would finance, supervise, direct and manage controllers, runners, bank and office workers and others.

VI. Among the means by which the aims and purposes of the said conspiracy were effected and its existence was concealed, were the following:

A. The defendant JAMES V. NAPOLI, SR. and others would finance and extend credit to controllers, and decide the percentage of the daily gross receipts and salaries to be paid to controllers, bank and office workers, and others.

B. The amount of money owed by controllers would be calculated regularly by defendants and co-conspirators in policy banks and offices and entered on records showing credit balances.

C. Controllers and runners would be denoted by code names such as "AA" and "XX" and code numbers such as "R 91" and R" 92" on policy slips, ribbons, master sheets and other records.

D. The locations of policy banks and offices would be changed regularly in order to hinder investigation by law enforcement officers.

E. Police officers unknown to the Grand Jury would be paid in order to hinder investigations and arrests.

F. Telephones would be used sparingly, and the interior of the HiWay Lounge, 362 Metropolitan Avenue, Brooklyn, New York, would be inspected, to hinder electronic surveillance by law enforcement officers.

G. The HiWay Lounge would be used by the defendant JAMES V. NAPOLI, SR. and others, to meet and discuss the operation of the said illegal policy gambling business.

[Title 18, United States Code, Sections 1962 (d), 1963]

COUNT TWO

From in or about March, 1972, to in or about July, 1972, within the Eastern District of New York, the defendants SALVATORE ANNARUMO, JERRY D'AVANZO, EUGENE SCAFIDI and ROBERT VOULO and other persons known and unknown to the Grand Jury, unlawfully, knowingly and wilfully conducted, managed, supervised and directed an illegal gambling business, such business (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining in substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of the New York Penal Law, Sections 225.00 through 225.40.

[Title 18, United States Code, Sections 1955 and 2]

COUNT THREE

From on or about December 13, 1972 to on or about March 9, 1973, within the Eastern District of New York, the defendants ANTHONY DI MATTEO, BARIO MASCITTI, ROCCO RICCARDI, EUGENE SCAFIDI and ROBERT VOULO unlawfully, knowingly and wilfully conducted, managed, supervised and directed an illegal gambling business, such business (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining in substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of the New York Penal Law, Sections 225.00 through 225.40.

[Title 18, United States Code, Sections 1955 and 2]

COUNT FOUR

From on or about April 13, 1973, to on or about June 15, 1973, within the Eastern District of New York and elsewhere, the defendants SALVATORE ANNARUMO, SAVERIO CARRARA, MARTIN CASSELLA, MICHAEL DE LUCA, ANTHONY DI MATTEO, JOHN LOTIERZO, SR., PASQUALE MACCHIROLE, BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., HENRY RADZIEWICZ, SABATO VIGORITO and ROBERT VOULO unlawfully, knowingly and wilfully conducted, financed, managed, directed, supervised and owned all and part of an illegal gambling business, such busine: (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining a substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of the New York Penal Law, Sections 225.00 through 225.40.

[Title 18, United States Code, Section 1955 and 2]

COUNT FIVE

From on or about January 1, 1973 to on or about June 15, 1973, the defendants MARTIN CASSELLA, PASQUALE MACCHIROLE, JAMES V. NAPOLI, SR. and HENRY RADZIEWICZ travelled in interstate commerce, that is, from the State of New Jersey to the State of New York, with the intent to distribute the profits of an unlawful activity, and to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the said unlawful activity being business enterprise involving gambling in violation of the New York Penal Law, Sections 225.00 - 225.40 and Title 18, United States Code, Section 1955, and thereafter the said defendants performed and attempted to perform acts to distribute the proceeds of the said unlawful activity and to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

[Title 18, United States Code, Sections 1952 and 2]

COUNT SIX

From on or about May 8, 1973 to on or about September 13, 1973, within the Eastern District of New York, the defendants PASQUALE MACCHIROLE and JAMES V. NAPOLI, SR., by means of intimidation and threats of force wilfully

endeavored to obstruct, delay and prevent Richard Bascetta and others from communicating information relating to a violation of a criminal statute of the United States, that is, Title 18, United States Code, Section 1955, to Special Agent Robert B. Liesegang and other Special Agents of the Federal Bureau of Investigation, United States Department of Justice, duly authorized by said Department, to conduct and engage in investigations of violations of said statute, who were then conducting and engaging in such an investigation, as the said defendants well knew.

[Title 18, United States Code, Sections 1510 and 2]

COUNT SEVEN

I. From on or about February 26, 1971, up to and including the date of this indictment, within the Eastern District of New York and elsewhere, the defendants FRANK ALTESE, SALVATORE ANNARUMO, SAVERIO CARRARA, MARTIN CASSELLA, JERRY D'AVANZO, MICHAEL DE LUCA, ANTHONY DI MATTEO JOHN LOTIERZO, SR., PASQUALE MACCHIROLE, BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., FRANK PINTO, CARMINE PIRONE, HENRY RADZIEWICZ, ROCCO RICCARDI, KENNETH ROSSI, EUGENE SCAFIDI, JOSEPH SIMONELLI, SABATO VIGORITO and ROBERT VOULO, wilfully and knowingly conspired, agreed and confederated together and with each other, and with the persons named in Count One, paragraph I B, named herein as co-conspirators, but not indicted, and with other persons known and unknown to the Grand Jury, to conduct, finance, manage, direct, supervise and own all and part of an illegal gambling business, in violation of Title 18, United States Code, Section 1955, and to travel in interstate commerce with the intent to distribute the profits of an unlawful activity, and to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the said unlawful activity being a business enterprise involving gambling, in violation of Title 18, United States Code, Section 1952.

II. Paragraphs IV, V and VI of Count One are incorporated and realleged herein by this reference.

III. In furtherance of the said conspiracy, and to effect its purposes, the defendants performed the following overt acts:

A. On or about May 1, 1972, the defendants EUGENE SCAFIDI and ROBERT VOULO possessed gambling records, within the Eastern District of New York.

B. On or about January 23, 1973, within the Eastern District of New York, the defendants JAMES NAPOLI, JR., MARTIN CASSELLA, and HENRY RADZIEWICZ met with the defendant JAMES V. NAPOLI, SR.

C. On or about May 11, 1973, within the Eastern District of New York, the defendants ANTHONY DI MATTEO, BARIO MASCITTI and ROBERT VOULO, met with the defendants JAMES V. NAPOLI, SR., and MICHAEL DE LUCA.

D. On or about May 14, 1973, the defendant JAMES NAPOLI, SR. met with the defendants ANTHONY MASCUZZIO, PASQUALE MACCHIROLE, JAMES NAPOLI, JR. and SABATO VIGORITO, within the Eastern District of New York.

E. On or about June 21, 1974, the defendant JOSEPH SIMONELLI Possessed policy gambling records, within the Eastern District of New York.

F. On or about March 24, 1975, the defendants FRANK ALTESE and CARMINE PIRONE possessed policy gambling records, within the Eastern District of New York.

[Title 18, United States Code, Section 371]

A TRUE BILL

_____
FOREMAN

_____
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Charge of the Court

THE COURT: After some six and a half weeks of trial, or at least over a period of six and a half weeks -- I think this is the thirtieth day of trial -- we've had 29 days from the time of picking the Jury as of yesterday -- twenty-nine actual days of trial, we have reached a point in the trial where it becomes my obligation to charge you on the applicable law.

I think a logical starting point is to explain the role that everyone plays in a trial, the lawyers, the Jury and the Court.

You probably learned enough about what is happening and the method of trying a Jury trial and the function that each one plays during the past six weeks without specific instruction. But I think it is good to clearly understand the part each one plays, because then you will fully understand your specific role.

The Jury trial in this country is called an adversary proceeding -- all our trials are. This is an adversary proceeding.

It means that the lawyers take sides on an issue.

It is a lot different than the European system which is called the accusatory system, or actually the Court takes part in developing the evidence.

In this country, the Court has nothing to do with the developing of the evidence. That is the lawyer's function.

You have seen it happen during the trial, The Government has called witnesses and the defendants have cross-examined, and that was for the purpose of developing the evidence.

One defendant has offered some evidence on one of the issues, as I recall it, Mr. Vigorito.

The theory is that when lawyers of comparable ability contest over an issue, they will develop the evidence for the Jury to see.

But the lawyers, as you understand, are impartial. They represent clients. They are protagonists. The believe in their position, and becuase of that, they do their job effectively.

I might commend the lawyers in this case for the manner in which they have represented their clients and presented the evidence.

They represented their clients very effectively. They wasted no time in a trial that started off with

20 defendants, we might have expected it to go on for many, many months.

They have made concessions where they felt that it was logical to do it.

They entered into stipulations to save time and, at the same time, fully protect their client's interests.

That is in accordance with the highest tradition of the Bar.

But you must understand that they are partial. They have to be, to do a good job.

The Court and Jury, on the other hand, are impartial. They are not disinterested, but in order to do the job effectively, both the Court and Jury must be objective.

You cannot take sides and be a judge, and you are a judge, collectively.

The Jury is the sole judge of the facts and that means that you, and you alone, decide what happened. You and you alone will decide, for example, one of the critical issues here, the voice identification of the various accused.

I have no opinion, one way or the other, about this case. I just have one overriding consideratio

in mind, and that is, that both sides be treated equally and fairly, that my rulings be evenhanded, to the best of my ability; that they be based solely on the law as I understand it.

Just as you are the sole judges of the facts, so the Court is the sole judge of the law.

Now, when we come to gambling statutes and we understand the tolerance that most citizens have for gambling, the participation that most citizens have in some form of gambling or another, it is particularly important that you understand that you must accept the law as I charge it. And specifically, you must accept the statute, the congressional enactment on gambling, which in turn is based upon, in part, on what the State Legislature has done on gambling.

It is not for you or I to say, "I like or dislike the law." Whether you like it or not, you are charged with the duty of applying it, and so it is with all the principles of law that I charge you on.

Now, if we each understand our function, I think the Jury trial has an excellent chance of working well and doing justice.

In the case before you, we have 14 defendants.

You are not to be concerned about others who you feel may have violated the law who are not before you.

You are not to be concerned about the others who were dismissed in the case.

I just found, as a matter of law, that the Government did not bring in the kind of evidence that was necessary before the case could be submitted to a Jury. In legal terminology, I found there was no fact question on that charge.

Now, I have found that there was a fact question on these charges, but that in no way means that I think that the defendants are guilty. That would be wrong.

I emphasize and I am very serious about it, I have no opinion one way or the other.

The mere fact that there is a fact question means only that you consider whether the Government proved its case. And as one lawyer added up the counts and I checked his figures to make sure he was right, in this case, you will make 19 decisions.

As you will see in some decisions, at least in Count Two, you will find that one decision there

may resolve five charges.

But the point that I want to make is that you must consider this as 19 separate trials, and you must measure the proof that was offered by the Government against the charge as to each count, as to each individual, to see whether the Government proved its case.

In my charge, I may use the singular or plural. I may say "defendant" or "defendants." I may say "accused" or "accused," collectively, as all the accused. But it will mean the same, unless I refer specifically to an individual defendant.

In every criminal case, the defendant is presumed to be innocent.

Now, that is a strong, time-honored presumption in Anglo-American law.

I ask you not to just give lip service to it. It is a very important concept in law.

It means that the defendant and all the defendants on all the charges have said, "Not guilty." And that raises the presumption of innocence, which means that you must conclude at the outset of the trial that each defendant is innocent of each crime charged, of all the crimes charged, and that

that conclusion remains with a defendant throughout the trial and throughout your deliberation.

The presumption of innocence alone is enough to acquit a defendant.

You may find the defendant guilty of the crime charged only if the Government has overcome that presumption, ineffect destroyed the presumption by proof beyond a reasonable doubt.

I sometimes explain it by calling your attention to what we commonly know as a Scotch verdict. You have probably heard the term, "Oh, it is a Scotch verdict."

In Scotland, there are three verdicts; one is guilty; the other, not guilty; and the third verdict is, not proved.

In this country, we have only two verdicts, it is either guilty or not guilty. So not guilty includes not proved.

What is the Government's burden?

We first must understand what a reasonable doubt is.

A reasonable doubt is a doubt which a reasonable person would have after weighing all the evidence in the case. It is not a doubt that one of the

lawyers said you must assign a reason for. No one will question your verdict, no one will have a right to ask you why you rendered one verdict or another. It is a doubt based on reason and common sense and based on the state of the record.

It is not the kind of doubt that you might have because you are disinclined to perform an unpleasant task.

It is not a vague, speculative or imaginary doubt.

It is the kind of doubt that would cause a person to hesitate to act in a matter of importance in his or her own life.

Proof beyond a reasonable doubt is therefore proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in a matter of importance to yourselves.

Now, the Government's burden is not to prove the defendants' guilty beyond all doubt. The Government's burden is not to prove that every bit of evidence that was offered at the trial is true beyond a reasonable doubt.

The Government's burden is to prove that all the essential elements of the crime are established

beyond a reasonable doubt.

Later in the charge I will tell you what the essential elements of the three crimes charged here are.

A defendant does not have the burden of offering any evidence. A defendant has a right to rely on the failure of the Government to prove his guilt by proof beyond a reasonable doubt.

A reasonable doubt may arise from the failure of the Government to produce evidence. The proof necessary to overcome the presumption of innocence is not measured by the number of witnesses that the Government brought to the trial, nor the number of documents.

There were some thirty-odd witnesses and thousands of documents, as I recall it. It certainly is not volume that counts.

What counts is the quality of the proof. What is evidence in the case?

The evidence is the sworn testimony of witnesses, regardless of who may have called them; the exhibits that were marked in evidence, regardless of who ma have produced them; and at times some exhibits were marked for identification and not marked in evidence.

They are not part of the record so you may not consider those that are marked solely for identification.

In this case we had tapes of conversations that were intercepted, pursuant to orders of the Court, or orders of the Court that authorized the interception.

We have voice exemplars.

The evidence also includes facts which were admitted or stipulated. It also includes those facts of which the Court took judicial notice.

For example, I think in one instances I said April 23rd. I don't know whether it was 1973, but it might have been. It was a Monday. That is a fact judicially noticed.

I think it is helpful to bring to your attention matters that are not in evidence that you might not consider.

The statements made by counsel in both their opening addresses and their summations are not evidence.

They serve a very useful purpose. I think it would have been quite impossible to intelligently deliberate on the issues before you without the

summations. I thought they properly focused on the issues and each side told you what they believe the evidence to be that supported their position.

At times the lawyers may have misstated the evidence. None of that is intentional.

You can understand that with six weeks of testimony or evidence and listening to at some times inconclusive statements, that one side may have remembered that something happened, the other side remembered absolutely the contrary.

But as they told you and as I tell you now, your recollection is what counts. Do not be hesitatnt about disagreeing with statements of evidence made by counsel, or for that matter, if I refer to the evidence.

Your recollection, and your power of recall, is probably as good as the lawyers, and one or more of you may have a better power of recollection.

But if there is any question in your mind, the transcript is available, and I will have the testimony that you seek read back to you.

Evidence stricken from the record must not be considered by you.

At times objection was made. The witness may

have answered and I said, "Strike it from the record."

As I direct the reporter to physically strike it from his record, I direct you to figuratively strike it from your mind and memory.

At times, objection was sustained to a question and the witness was not permitted to answer. You may not speculate on what that answer would have been if the witness were allowed to answer.

It is on the same theory; it is not in the record, so you may not consider it.

A substantial part of the evidence consists of recording of voices that were seized. You are to decide what was said and the identity of the speakers. The transcripts of the tape or tapes is not evidence. It is solely an aid, so that you may recall what you heard on the tapes.

On the question of identity of the voices, you heard testimony of FBI agents. Just like all other testimony, you need not accept it if it is uncontradicted.

Of course, if it is contradicted, you will make your determination as to whether or not the person to whom the voice is attributed is the speaker.

During the trial, you took notes while the

testimony was given and while the tapes were played. Some of the notes were on the transcripts. No one has seen these personal observations that you took down. They are here behind my desk and if you ask for those notes you originally made, they will be available to you. I will distribute them to you. But you have to ask for them. I will not distribute them if you do not ask for them.

But if you use the notes, they are solely to refresh your own recollection as to what you heard. You are not to use them to convince others as to the accuracy of your recollection.

Now, as I said, the Government must prove the guilt of the defendant by proof beyond a reasonable doubt. If the only proof against an accused is a voice that was seized on tape, then it follows that you must be convinced beyond a reasonable doubt that it is the voice of the accused.

Voice identification testimony is an expression by the witness based upon what the witness saw and heard to the time that he appeared before you and testified.

It is the testimony that you heard as to voice identification. The Government has marked in

evidence exemplars which recorded the voice of some of the accused.

You may, if you wish, ask that the exemplars be played and compare them to the voices seized on the tapes.

In determining the weight of voice identification testimony, you should consider, among other factors, one, the degree of certainty or doubt with which the witness testified on voice identification. Take into consideration whether the witness had the capacity and an adequate opportunity to hear the voice of the accused aside from the tapes. Take into consideration the length of time and under what circumstances the voice of the accused was heard.

Was it face-to-face? Was it by exemplar? Determine whether his testimony is based solely on the recollection of the voice or whether it is based on suggestion, through hearing other transcripts alleged to be the voice of the accused, or suggestion by other agents.

Disregard so much of the testimony as indicates that voice identification was based on what someone else told the agent the voice was.

Take into consideration whether the witness

on prior occasions failed to identify the voice as that of the accused.

Determine, in such failure, whether the agent, the witness, identified the voice as someone else's voice or whether he noted that it was an unidentified subject.

In determining the weight to be given to voice identification, take into consideration all the circumstances in making the prior identification or misidentification. Was it a short conversation? Was it just merely, "Yeah, hello," or did the conversation continue for many seconds or many minutes.

Take into consideration whether there were any interfering noises or disrupting and intercepting voices of others.

The Court does not intend to imply that the only identification of an accused is through voice, nor does it intend to imply that the only evidence as to any individual is voice identification.

There are defendants here where a voice identification is the only evidence. I hesitate to sort them out, but I do recall that the only evidence that would bring defendants into the policy business chargedwhere voice identification must be

proved beyond a reasonable doubt is James Napoli Sr. and James Napoli Jr.

I think the same is true as far as Mascitti and DiMatteo, but I am not sure. But, at any rate, as to those where voice identification is the evidence that must bring a defendant into either of the policy organizations charged in the indictment, that identification must be proved by proof beyond a reasonable doubt.

In addition to the factors I just pointed out, you may look to evidence showing the presence or absence of the accused at the place and at the time the conversation was seized.

Where there is evidence in the case of the accused's participation in the crime charged, after the Government has proved that the policy business was in existence as charged in the indictment, you may consider the voice identification evidence in addition to the other evidence in the case in determining whether the Government proved the guilt of the accused beyond a reasonable doubt.

There is testimony that when the agents first made the transcripts of the tape, that they made a handwritten draft and that, thereafter, the handwritten

draft was destroyed, after it was compared with the typewritten copy.

Now, if you find that the agent who made the draft or any other agent destroyed that copy with the intention of withholding evidence from the defendants, then you may infer from that destruction and the finding of that intention, that if the draft were produced that there would be proof of some misidentification of voices.

Now, what is evidence?

Evidence is the method by which a disputed fact is proved or disproved. Evidence is generally classified as direct evidence or circumstantial evidence.

Direct evidence is the testimony of witnesses of what the witnesses saw or heard.

Circumstantial evidence, sometimes called indirect evidence, on the other hand, is a way of proving or disproving a disputed fact, by making a reasonable inference based on common sense and experience from established facts.

Now, the lawyers used a hypothetical in trying to demonstrate to you what circumstantial evidence was, and that was the occasion where a couple got married and there was rice and shoes and maybe even

some banners sayin, "Just Got Married," and marital music.

Those are the circumstances from which a common sense and reasonable inference would be drawn indicating that the couple had been married.

I use one that I will use now that indicates the difference between direct and circumstantial evidence.

If you were sitting here as a Jury in a personal injury case and, let us assume the hypothetical facts were that a motor vehicle travelling down one of the city streets struck the plaintiff.

Let us assume that the plaintiff claimed that the defendant was travelling at 60 miles and hour and passed a stop sign at the particular corner without stopping and struck her.

Let us assume it is a female plaintiff and a male defendant, so we know who we are talking about.

If my Courtroom deputy, Mr. Giokas, and myself were standing at that particular corner, we might be called as witnesses.

Let us assume that he was talking with me. I had my back to the roadway and the sign, while he was facing the roadway and the sign.

Well, the issue there is: Did the defendant pass the stop sign without stopping.

There is where we have the adversary proceeding, one party on one side and one on the other, the plaintiff saying, "Passed the stop sign without stopping," the defendant saying, "No, I stopped and then proceeded."

If Mr. Gickas was called, he might say, "Well, I was talking with the Judge at a particular time and at a particular place, and I noticed this 1976 Cadillac driving at 60 miles an hour past the stop sign and strike the plaintiff."

Now, that is direct evidence on that issue.

Now, if I were called as a witness, I could not give direct evidence on that issue, because my back was to the stop sign. But I could testify as to circumstances from which you could draw reasonable inferences, that the defendant passed the stop sign without stopping, and I might say that while I was talking with Mr. Gickas, I turned to my right and this 1966 Cadillac came within my peripheral vision. It was travelling at 60 miles and hour. It passed behind me and I lost sight of it for about 150 feet, and about two or three seconds later, I turned to

my left and there it was, travelling at the same rate of speed, and struck the plaintiff.

Now, I think that if you just took those circumstances alone, without the direct testimony, that the reasonable inference based on common sense and experience would be that that motor vehicle did not stop at the stop sign, but proceeded past it at approximately the same rate of speed.

You take the speed of the car, the distance that it travelled over, the short time period, two or three seconds, and you know that it would have been difficult, if not impossible, to have stopped and then proceeded and gotten up to 60 miles an hour and passed that space within a period of two or three seconds.

So there you have direct evidence and circumstantial evidence on the same issue.

The law does not hold that one type of evidence is of better quality than the other. At times circumstantial evidence is better. At times direct evidence is better. The law only requires that on all the evidence, both the direct and circumstantial evidence, the Government prove the guilt of the defendant by proof beyond a reasonable doubt

THE COURT: I used the word inference and I used the word presumption. There is a difference. An inference is a conclusion which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case. So an inference is a conclusion that is drawn by the jury. A presumption on the other hand is a conclusion which the law requires the jury to make and it continues only so long as it is not overcome or outweighed by evidence beyond a reasonable doubt to the contrary. Unless the presumption is so outweighed, the jury is bound to find in accordance with the presumption. An example of that is the presumption of innocence.

You the jurors are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified., in every matter in evidence which attempts to show whether a witness is worthy of belief. Consider the witness' intelligence; consider the witness' motive and state of mind, his or her demeanor while on the witness stand. In

other words, when you talk about motive and state of mind, you determine why the witness is testifying. Does his motive or her motive indicate that you should give weight to the testimony or should you suspect it. When we talk about demeanor on the witness stand, we talk about the manner in which the witness testifies. Is the witness testifying forthrightly, fully and directly, or is the witness evasive. Take into consideration the witness' own ability to observe the matters as to which he has testified and whether he or she shall have impressed you as having an accurate recollection of those matters.

You may take into consideration the interest that the FBI agents have in a successful prosecution of a case on which they have spent so much time and effort.

You take into consideration the relation each witness bears to either side of the case, the manner in which the witness might be affected by the verdict, and the extent to which, if any, the witness is supported or contradicted by other testimony in the case or his own testimony.

A witness may be discredited or impeached by

evidence that at a prior time the witness gave testimony inconsistent with the testimony he gives before you at the trial. It is what we call impeaching testimony.

In weighing the testimony of agents on the voice identification you may consider the testimony of the agents in the light of prior identification, as I indicated to you previously. If he says something differently than he said before you consider the effect it would have on the weight of the testimony that he gave before you.

Now in considering the prior testimony, and particularly prior misidentification, take into consideration all the circumstances. First decide whether it is inconsistent. For example, where an agent said, "unidentified male," and later he identified one of the accused, you determine whether that is an inconsistent statement, and if it is, you determine how it affects the credibility of the witness.

Credibility does not necessarily mean that the witness is intentionally lying. Any error, or misstatement, misjudgment, might affect credibility. If the agent at a prior time

attributed the voice to A and now he says it is B, that is inconsistent In determining the effect it has or should have on the weight of the identification testimony, look into the entire identification made by the witness of the accused and determine whether the misidentification is one that indicates that he can't identify a voice. You might want to have a look at all the circumstances including the length of the conversation that he misidentified and again whether there were other disturbing and distracting noises that interfered with a fair identification.

If a witness is shown to have knowingly testified falsely concerning a material matter you have a right to distrust all such witness' testimony on the theory that the witness is not worthy of belief, or you may decide to accept that part of the testimony that you recognize as being truthful.

That principle merely underscores the wide discretion that the jury has in assessing credibility

The law does not compel a defendant in a criminal case to take the witness stand and testify. No presumption of guilt may be raised and no unfavorable inference of any kind may be drawn on

the failure of the defendant to testify. The defendant, as previously charged, may rely on the failure of the Government to prove its case. It would be improper for you to even discuss the failure of any accused to take the witness stand.

The rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education or experience who become expert in some art or science or profession or calling may state an opinion as to relevant material matter in which they profess to be expert. They may also state their reasons for their opinion. You should consider each expert opinion received in evidence in this case, and as I recall it, we had two experts, McBride and Harker, McBride on fingerprints and Mr. Harker as an expert on gambling. If you should decide that the opinion of an expert is not based upon sufficient education and experience, or if you should conclude that it is not supported by reason and common sense, disregard it.

An expert witness is like any other witness. The mere fact that we call him an expert does not

mean you should not consider the credibility of the expert and the weight to be given his testimony.

Now we come to the indictment. You have been furnished with what I have chosen to call a Memorandum of Verdict. I told you it has no official place in our system. The other is a copy of the indictment as it affects the accused. An indictment is the Court's or the law's manner of bringing someone into court to answer the charge. It can't be used, or the allegations can't be used to prove the very charges. As I said, the defendants have said not guilty and the proof to support the charges has come from the witness stand and not from reading the indictment.

The Memorandum of Verdict is a précis or summary of the charges. I intended to use them at separate times. That is why you have both a summary and complete charge. Had I known that I would give you both at the same time I would just have said Count 1 and leave it with you to read the charge. But you can use both, understanding that one is just to remind you generally as to the charge, and you go back to the indictment for the full charge. For example on Count 1 on the Memorandum of Verdict

I did not mention the defendants Annarumo, D'Avanzo, Scafidi and Voulo and other persons known and unknown to the Grand Jury. And that is significant as you will see later. But, as I say, the charge is in the indictment.

You will find that the charges read pretty much alike except for time, and the defendants, and that is because they are based on the same statute.

I will read the charges first:

"Count 1. From in or about March, 1972, to in or about July, 1972, within the Eastern District of New York, the defendants SALVATORE ANNARUMO, JERRY D'AVANZO, EUGENE SCAFIDI and ROBERT VOULO and other persons known and unknown to the Grand Jury, unlawfully, knowingly and wilfully conducted, managed, supervised and directed an illegal gambling business, such business (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining in substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of the New York Penal Law, Sections 225.00 through 225.40"

And the section cited is "Title 18, United States Code, Sections 1955 and 2."

And Count 2. From on or about December 13, 1972 to on or about March 9, 1973, within the Eastern District of New York, the defendants ANTHONY DI MATTEO, BARIO MASCITTI, ROCCO RICCARDI, EUGENE SCAFIDI and ROBERT VOULO unlawfully, knowingly and wilfully conducted, managed, supervised and directed an illegal gambling business, such business (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining in substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violationof the New York Penal Law, Sections 225.00 through 225.40.

"Count 3. From on or about April 13, 1973, to on or about June 15, 1973, within the Eastern District of New York and elsewhere, the defendants SAVERIO CARRARA, MICHAEL DE LUCA, ANTHONY DI MATTEO, JOHN LOTIERZO, SR., BARIO MASCITTI, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., SABATO VIGORITO and ROBERT VOULO unlawfully, knowingly and wilfully conducted, financed, managed, directed,

Charge of the Court

supervised and owned all and part of an illegal gambling business, such business (1) having a gross revenue of two thousand dollars ($2,000) on a single day, (2) remaining a substantially continuous operation in excess of thirty (30) days, (3) involving five persons in its conduct, financing, management, supervision, direction and ownership, and (4) being in violation of the New York Penal Law, Sections 225.00 through 225.40.

The defendants are charged in three counts with knowingly and wilfully performing various roles in an illegal policy business, which business consists of five or more participants and which business on any particular day in which there were the five participants had bets totalling more than $2,000.

(continued next page)

or during the period of more than thirty days in which they were in substantial continuous operation had five or more participants.

Count one charges that Annarumo, D'Avanzo, Scafidi, Voulo and others engaged in policy in or about March, 1972 and in or about to July, 1972.

Count two charges the five named, Di Matteo, Moscitti, Riccardi, Scafidi and Voulo during on or about December 13, 1972 to on or about March 9, 1973, conducted that business.

The significant difference of course is that since the indictment charges these five the Government must prove beyond a reasonable doubt that these five, no others, although there may have been others, but you must find these five conducted the policy business charged during that period. And that on a particular day, any particular day during that period, that the total number of bets was in excess of $2,000 and/or that's the alternative, that those five individuals were operating that policy business continuously or in substantial continuous operation.

We know from the evidence that policy is not, or at least that is the evidence, that policy is not operated on Sunday. Substantial continuous operation

means more or less continuous, that is skipping Sundays, for a period of more than thirty days.

Count three charges that ten named individuals were in the policy business from on or about April 13, 1973, to on or about June 15, 1973 and had consisted of those ten. And you don't have to find that all ten were in operation to find that the Federal law was violated. But you must find that five of those ten named were in the policy business and fulfilling the conditions I just indicated.

The ten are the defendants:

CARRERA, DE LUCA, DI MATTEO, LOTIERZO, MOSCITTI, MASCUZZIO, JAMES NAPOLI, SR., JAMES B. NAPOLI, JR., VIGORITO AND VOULO.

All counts have similar charges. And I will refer to each specifically when it is necessary to do so.

An illegal policy business is similar to a legitimate enterprise where five or more people get together for profit or to earn a livelihood. The vital difference, of course, is that the joining in the business violates both State law and Federal law.

The statute upon which the indictment is based is 18 USC, Section 1955. And I might say you might disregard that Section 2. It is irrelevant.

Charge of the Court

It reads in pertinent part as follows:

"...Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business..." violates the Section.

And then the Section goes on to definitions. As used in this Section, "One, illegal gambling business means a gambling business which -- and then sub-division one of that -- is a violation of a State or political sub-division in which it is conducted. And in the framework of this case, "one" is a violation of the New York State Gambling Statutes.

Two, involves five or more persons who conduct, finance, manage, supervise, direct or own all or a part of the business.

And, three, has or remains in substantially continuous operation for a period in excess of thirty days, or has a gross revenue of $2,000 in any single day. And I charge that my interpretation there must prove a gross revenue in excess of $2,000 in any single day.

And I charge that my interpretation is that they must prove a gross revenue in excess of $2,000 on any single day.

Gambling includes but is not limited to conducting lotteries or numbers games.

State means any state of the United States, District of Columbia, Commonwealth of Puerto Rico, and any territory or possession of the United States. That is the Federal statute.

But the Federal statute is not violated unless the State statute is violated. So I come to State law. Section 225.00 was referred to in the indictment, in the charges. Section 225.00 defines terms and gambling offenses.

Sub-section 2, "Gambling: A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence upon an agreement or understanding that he will receive something of value in the event of a certain outcome."

Now, under New York law, a bettor is not a violator. It is only the business that is proscribed, prohibited, that is, by New York State statute.

Here is the definition of a player: "A player means a person who engages in any form of gambling solely as a contestant or bettor without receiving or becoming entitled to any profit therefrom other than personal gambling winnings and without otherwise rendering material assistance to the establishment, conduct or

operation of a particular gambling activity."

So a player is someone who is not interested in any way in the actual conduct of the operation but where his role is solely that of betting on the number in a policy game.

The advance of gambling activity: A person advances gambling activity when acting other than as a player engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed towards the creation or establishment of a particular game, contest, scheme, device or activity involved toward the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus thereof; toward the solicitation or inducement of persons to participate therein; toward the actual conduct of the playing phases thereof; toward the arrangement of any of its financial and recording phases; pr towards any other phase of its operation."

(continued on next page)

Charge of the Court

hr/ss

3aml

THE COURT: (Continuing.) "One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

"Profit from gambling. A person profits from gambling activity when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

"Something of value means any mo ey or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of service, entertainment or a privilege or playing at a game or scheme without charge."

Subdivision 11 of 225 defines policy or the numbers game, means a form of lottery in which the winning chances or plays are determined upon the basis of a drawing or other act on the part of persons

conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

Unlawful means not specifically authorized by law.

Now, those are the definitions.

The gambling statute, Section 225.10 defines promoting gambling in the first degree.

"A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity by receiving in connection with a lottery or policy scheme or enterprise money or written records from a person other than a player whose chances or plays are represented by such money or records or, B, more than $500 in any one day of money played in such scheme or enterprise."

225.20, possession of gambling records.

"A person is guilty of possession of gambling records in the first degree when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article of a kind commonly used in the operation, promotion or playing of a lottery or policy

scheme or enterprise, and constituting, reflecting or representing more than 500 plays or chances therein."

The Government must prove in effect that in participating in the policy business, the defendants also violated state statute.

The Government must prove that the defendants either conducted, financed, managed, supervised, directed or owned the gambling business, which business violated the New York State statute.

In each offense charged the Government must prove beyond a reasonable doubt, 1, the existence of a policy business in violation of New York State law; 2, that the policy business as charged in each count was knowingly and willfully formed and existed during the period set forth; 3, that at the time the business had five or more participants, it either had a gross revenue of more than $2,000 in any single day, or remained in substantially continuous operation for a period in excess of 30 days.

So the alternative is that the Government must prove either on one day when five were in the business the bets exceeded $2,000, or even if it was less than $2,000 a day, that it remained in substantially continuous operation for a period in excess of 30 days

And 4, that the accused -- and now we come to the individual to see whether the Government proved his role in connection with the conspiracy.

First, as I said -- not first, it was the second element, the Government must prove that the business that is charged in the indictment was in existence.

Now, in order to prove the crime against the individual the Government must prove that the accused knowingly and willfully participated in the policy business.

Now, the Government need not prove that each participant did a business in excess of $2,000 or that each participant was in that business for at least 30 days in substantial continuous operation. It must first prove that the business complied with that condition and then prove that the accused knowingly and willfully became a member of that business.

In determining whether policy business was knowingly and willfully formed, take into consideration all the statements and acts of the alleged participants. The mere fact that the parties got together and were associated with each other to discuss matters of common interest does not in and of

itself establish the existence of a policy business.

On the other hand, it is not necessary for the Government to show that all five charged got together and entered into any formal or expressed agreement as might be expected in a legitimate business.

It is not necessary for the Government to prove that all of the participants in the business knew each other or that all the details of the policy business was agreed upon by all the participants.

The Government must prove beyond a reasonable doubt that the participants through their words and acts positively and tacitly understood that they were engaging in an illegal policy business.

The Government must prove the existence of the conditions in the third element during the same period of time. The Government fails in its proof if it proves only that at a time when less than five participants are in business it either grossed more than $2,000 or remained in substantial continuous operation for more than 30 days.

In other words, it's not a federal crime if the Government fails to prove that five participants engaged in the business.

Concerning the last element of the crime charged,

proof that the accused knowingly and willfully participated in the policy business, that must be based on evidence of what that party said or did, not on evidence of what somebody else said a particular accused did.

(Continued next page.)

For example, if A and B and charged in the offense and A and B discussed C as being a member of that business, that's not evidence that can be used to determine whether he is really a member.

I charged you at one time and I charge you again that the acts and declarations of one member, one partner in the business, is chargeable against anyone else you find to have knowingly and wilfully entered into the business. You see, that's a matter of how to treat evidence.

But before you can charge anyone with what someone else said, you must show that he gave some authorization, implied authorization as a partner. Before you can do that, the proof must be that he was a partner.

Now we are talking about what we call criminal liability and not just treating evidence. So you must first determine whether the Government proved beyond a reasonable doubt that he was part of that operation.

The Government must prove that he was aware that he was dealing in policy, and that his participation was wilful, not merely accidental or even negligent.

I thought I would expand on it at this time,

but I will leave it for a little later in the charge.

The mere presence of an accused at a time and place where policy operation is going on is no proof participation in the conspiracy. The mere fact that there is proof that he knows that the policy is going on is no proof of participation. It must be something, an act or a statement, that indicates that he is working in the organization, that he is transferring slips, transporting them, paying off bettors, making betting records, providing the capital, something that contributes to the success of the policy business.

If you find from the evidence that a particular defendant performed an isolated act, one single isolated act, and such act does not indicate a regular continuous course of business in the illegal gambling business, then you must find the defendant not guilty because one act would not show that he was participating in the business.

Now, of course, if the act showed that he understood and knew that it was a gambling business and the acting in and of itself showed that it did happen more than once, then we have a different situation. But if we have a situation where it was one single isolated act, then you must find that

accused not guilty.

Now, a definition of the term, I have probably defined these.

Knowingly means being aware that the illegal operation was going on and that whatever was done was not done innocently.

I used the term wilfully. An act is done wilfully if it is done voluntarily, deliberately and intentionally and not by accident, inadvertance or through negligence.

The Government must prove beyond a reasonable doubt as to each defendant that his acts and conduct with relation to policy were done with an awareness that it was part of a gambling business and that knowing and understanding it was a violation of law to be engaged in policy business, he nevertheless, deliberately, intentionally and voluntarily performed those acts.

Now, the Government need not prove that the defendant knew he was violating a specific statute.

Criminal intent is a subjective element that can rarely be established by direct evidence. You determine from the circumstantial evidence in the case whether the Government proved beyond a reasonable doubt

that the accused was aware and wilfully entered in the policy business.

The words "conducts, finances, manages, supervises, directs or owns" are used in the ordinary sense of their meaning.

Conducts means to carry on or to manage a business. To conduct therefore would exclude one who participates as a bettor. It would include those who derive some profit or income from a business and not one who wins or loses a bet.

Finance means one who makes funds available to the business, and manage makes to handle or control the business.

I admitted into evidence testimony that one or more of the defendants were, or some evidence that one or more of the defendants were engaged in policy, either prior to the period they were charged in this indictment or subsequent to that period. That testimony has a limited use.

Number one, if you believe the testimony, if you think it significant, it's chargeable only against that person where the evidence indicated that he was somehow engaged in policy.

Secondly, it may only be used against that

accused if you first find that the Government established beyond a reasonable doubt that he performed some act that indicated that he was part of the policy business. Then you may use it on the issue of criminal intent as to whether he was aware of what he was doing and whether he did what he was doing intentionally.

For example, if accused A was found with policy slips a year, two years before the period, or maybe six months after the period he is charged with in the indictment, and the Government proves beyond a reasonable doubt that he had policy slips in his possession on him or anyplace else, now finding the slips in his possession might be considered to be part of the business with which he is charged. And again, that decision is up to you.

But let's assume you find that, but it may be under circumstances that do not make it clear enough to you that he knew that he was dealing in policy at that time during this period. Then you may consider proof of prior or subsequent similar acts to determine whether he knew that he was dealing in policy.

What I must caution you against is using evidence of proof of some crime outside the period

charged in order to convict him for this crime, where that proof would not establish the crime charged in the indictment.

What I am saying is do not convict him because he did something wrong at a time other than that charged in this indictment when you find that the Government hasn't proved its case against the defendant on the charge that's in this indictment.

A defendant need only answer the charge in the indictment before him in this trial and nothing else. The evidence of other crimes has a limited use and a limited value.

I will shortly excuse you to deliberate on the matter, but before I do, you are to understand that you are not to be concerned with possible punishment. That's a matter solely for the Court. Your function here is only to decide the issues before you and the issues before you are the guilt or innocence of these defendants on 19 charges.

During your deliberations you may have occasion to ask for testimony. Now, as I said, we have over 5,000 pages and it will take a long time to find what you want. I will give you or try to give you only what you ask for. If you ask for all the testimony

on a particular subject matter, for example, then we have to find all the testimony of all the agents and go through all the volumes and various days. It could take a very long time.

If you are specific in what you want, then it will be easier and we will be able to give it to you. So if you can give the subject matter and the name of the witness, and if you want all the testimony, say all the testimony. If you want the cross, say the cross. If you want the direct, say you want the direct. If you want it all, of course, you shall have it.

And the same thing is true with exhibits. There will be no sense in sending tapes into the jury room because you don't have the equipment to hear it. If you want the tapes, it will be played in open court. If you want to hear the exemplars, it will be played in open court. If you want to hear both at the same time, that will take a long time. I will have to order the Government to set it up for you and I don't know how long it will take. But you have to be patient once you make the request.

Now, the verdict on each count as to each individual must be unanimous. It is not a verdict until

it is unanimous.

Don't tell me how you stand as to any defendant as to any count. Don't tell me you are ten to two or eight to four or anything else.

If you arrive at your unanimous verdict, write the message through your Foreman. And all the messages will come through the Foreman, actually through the Marshall, to me.

When you arrive at a verdict, just say we have arrived at a verdict. Don't tell me whether it's guilty or innocent. The first time the verdict should be announced is in open court. I should have no prior information. I will call the jury into the courtroom and I will follow this form.

I will say, in effect, "Madam Foreman, I have your note where you say you arrived at a verdict. On Count One, how do you find the defendant Salvatore Annarumo, guilty or innocent? On Count Two, how do you find the defendant Jerry D'Avanzo," and so forth and so on. And I will go through all the counts.

When I have heard all that in open court, then I will ask Juror No. 2 whether the verdict as rendered by the Foreman is your verdict, Juror No. 3, whether it's his verdict, Juror No. 4, whether it's her

verdicts and so on. And when I get 12 verdicts, the same 12 verdicts in open court on each count, then for the first time we have a verdict in this case and not before.

Now, each juror should arrive at his or her verdict through his or her own mental processes and not depend on any other jurors. It should be your decision and not your fellow jurors' decisions.

On the other hand, you have a duty to consult with the jurors in an effort to arrive at a unanimous verdict.

The jury process is a deliberative process. It's a consultant process. You exchange views based on the evidence.

It's improper for any juror, for example, to come into the jury room and say, "I have made up my mind. Don't talk to me." That's wrong.

You are a member of a jury. You sit down with your jurors, your fellow jurors, express your views, point to the evidence, talk about the evidence. If after discussing the matter with your fellow jurors you realize that the first decision that you came to is not supported by the evidence, don't hesitate to change it.

Just as it's improper for anyone to take a stubborn and intransigent view, so it's improper for a person to abandon his duty and say, I am Friendly John or Neighborly Jane and I never argue with anybody and I will go along with whatever you said. That's wrong, too.

The parties are entitled to 12 separate verdicts arrived at after full discussion and deliberation on the matter.

And if you do that, you do your job well. And the verdict can go one way or another, neither side can complain knowing that you gave the case your careful attention and abided by the law as I have charged it.

Now I am going to excuse you for a few moments. Don't start your deliberations. I must consult with the lawyers and I will call you back.

The jury is excused.

(The jury leaves the courtroom at 11:09 a.m.)

(The following takes place outside of the presence of the jury:)

MR. DI CARLO: Your Honor --

THE COURT: I want to take it in order, otherwise we will have chaos.

Mr. Brill, do you have any exception or addition?

HR:jk
5AM R1

Charge

(The jury enters the courtroom at 11:41 A.M. and the following takes place in open court and in the presence of the jury:)

THE COURT: In my charge I referred to count 2 which charges the defendants DiMatteo, Mascitti, Riccardi, Scafidi and Voulo. And I said it before, but I will say it again. The Government must prove that these five defendants and only these five operated the policy business in violation of federal and state statute during the period set forth in the indictment, and either on a day when the five were in the business, all five, grossed more than $2,000, or alternatively, that all five, and only these five, were in substantial continuous operation of that business for more than thirty days.

Now, I told you that the Government must prove its case beyond a reasonable doubt and if the only evidence against an accused is that which is found on the tape, then obviously the Government must prove beyond a reasonable doubt that the accused is the man charged. And that seems to be clear.

And if it fails to prove beyond a reasonable doubt that a particular defendant accused is the man speaking on the tape, then you must find him not guilty.

I mentioned that it applied to Mr. Napoli, Sr., Mr. Napoli, Jr. And in going over the testimony as to count 3, it applies to the following, in other words, the Government must prove beyond a reasonable doubt that the voice on the tape was Saverio Carrera, that the voice on the tape was Michael Deluca, that the voice on the tape was Anthony Mascuzzio, that the voice on the tape was Sabato Vigorito, that the voice on the tape was Robert Voulo.

And in determining whether the Government proved the identity of the voice, use all the factors I suggested to you and your good common sense and ears, what you listened to and heard.

I did call your attention to the fact that the indictment is not evidence. It's just a charge, the way the Government brings someone into court to answer the charge. That's clear. Don't use the statement in the indictment and assume they are true. The proof must come from the witness stand and the exhibits.

Mrs. Arthur, you are excused. You may step down now and I thank you for your service.

At this point you probably might think that you rendered no service, but you see what happened, we had four alternates and we used three out of the

four and if we didn't have four alternates we couldn't proceed. And you served a very useful function. And your lunch will be coming in to my chambers first and you may receive it there and from now on you are separated from the jury.

Thank you very much.

Will the Clerk please swear in the marshals?

(The marshals are sworn by the Clerk of the Court:)

THE COURT: Now you are about to retire to deliberate on the matter. I have asked the Clerk to give the Foreman one extra copy of this form of verdict. When you have arrived at a verdict you fill it out and sign one. It's not an official form, but I like to keep a record. The other copy you must mark up anyway you wish and that's true of all the forms that I have given you.

At the end of the case, if you rendered your verdict and you want to tear it up into little bits, you are free to do so.

I expect the lunch will be delivered about twelve o'clock. I expect to excuse all lawyers when the lunch comes in for an hour. If I get a note in the meantime, I will have to wait until the lawyers

get back from lunch to discuss it with them.

Everything you send me, I discuss it with the lawyers. If they are not available, there is a delay. I am saying this so that you understand it. I don't want you to think I have forgotten about you because I don't answer your notes. It's just that I couldn't get to it at the time.

You took an oath at the beginning of this trial to render a fair and just verdict and that means a verdict based on the evidence, free of all bias, prejudice and sympathy and in accordance with the law as the Court charges. I expect you will be fair and impartial to both sides, and the jury is excused for deliberation of the matter.

(The jury leaves the courtroom at 11:47 A.M.)

(The following takes place out of the presence of the jury:)

MR. BRILL: Your Honor, Mr. Lotierzo has asked me to make application to the Court. He had some oral surgery done and he has to go back to the doctor to check it out. He is in pain. Can he leave for awhile?

THE COURT: Suppose the jury comes back and asks that testimony be read back and suppose the jury

District Court Decision of November 26, 1975 (Excerpts)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

FRANK ALTESE, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

* * * *

In the present action, the counts which remain in the indictment are adequately pleaded and they satisfactorily apprise the defendants of the charges against them. The particulars voluntarily offered by the government are sufficient and the government properly refused the defendants' other demands which relate to evidentiary facts which are not the proper subject of a bill of particulars, except in instances where the evidentiary facts are necessary to enable the defendant to prepare his defense.

* * * *

Defendant Napoli, Sr., has moved for a severance of his trial from that of the other defendants, and severance of the conspiracy count from the alleged substantive violations. Rule 14, F.R.Crim. P., permits the court to grant a severance if it appears that the government or defendants will be prejudiced by a joint trial. There has been no showing that the defendants will be in any way prejudiced by a joint trial on all counts. The motion for a severance is denied.

Several defendants have requested leave to make further motions as appropriate. Counsel for all parties have had sufficient time to make appropriate pre-trial motions. Leave to make further motions is denied, except as to suppression motions related to electronic surveillance.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

EUGENE SCAFIDI, et al.,

Defendants.

- - - - - - - - - - - - - - - - - -x

No. 75-CR-341

Memorandum of Decision and Order

December 23, 1975

MISHLER, CH. J.

Defendant moves for a severance pursuant to Rule 14, F.R.Crim.P., on the ground that joining 22 defendants in the conspiracy count under 18 U.S.C. §371, and in the substantive counts charged under 18 U.S.C. §1955,[1] is inherently prejudicial.

Defendant cites United States v. Sperling, 506 F.2d 1323, 1340-41 (2d Cir. 1974), cert. denied, 420 U.S. 955, 95 S.Ct. 1351 (1975), in support. Reliance on Sperling is misplaced. Sperling pointed to the developing practice of prosecutors in presenting multiple loosely-knit narcotics conspiracies in a single charge, with resultant confusion

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[1] 18 U.S.C. §1955 makes a federal crime of participating in an illegal gambling business where five or more persons participate for two or more days and there is gross revenue in excess of $2,000 on any single day.

that might prejudice one or more defendants. The manner of doing business in a large gambling conspiracy is far different than in various phases of a narcotics conspiracy. The real question is whether the conspiracy charged is a single crime or multiple crimes. Defendant's moving papers show nothing to indicate that the gambling conspiracy charge here involves more than one gambling business (although the evidence in the trial may support the argument made here). Defendant cites no case which faults an indictment on the ground of mere numbers. The problems of trying numerous defendants are management problems with which the court can deal, and at this point there is no certainty as to the number of defendants who will be tried.

Defendant also claims that prejudice inheres in joining the charges of substantive crimes under 18 U.S.C. §1955 with the charge of conspiracy to commit these crimes under 18 U.S.C. §371. Such joinder is proper. United States v. Revel, 493 F.2d 1 (5th Cir. 1974), cert. denied, U.S. , 95 S.Ct. 1559 (1975); United States v. Vaglica, 490 F.2d 799 (5th Cir. 1974), cert. denied, U.S. , 95 S.Ct. 1558 (1975); United States v. Iannelli, 477 F.2d 999 (3d Cir. 1973), aff'd, U.S. , 95 S.Ct. 1284 (1975); United States v.

Fiorella, 468 F.2d 688 (2d Cir. 1972), cert. denied, 417 U.S. 917, 94 S.Ct. 2622 (1974); United States v. Beck, 461 F.2d 230 (2d Cir. 1972).

The motion to sever is in all respects denied, and it is

SO ORDERED.

U. S. D. J.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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75-CR-341

UNITED STATES OF AMERICA

- against -

FRANK ALTESE, et al.,

Defendants.

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Memorandum of Decision and Order

October 14, 1976

MISHLER, C.J.

The defendants herein were tried on four counts of a seven count indictment for conducting a large-scale gambling enterprise and conspiring to engage in the same, in violation of 18 U.S.C. §§ 1955 and 371. (The other counts charged violations of 18 U.S.C. §§ 1952 and 1962. These counts were severed before trial). Defendants James Napoli, Sr., Anthony DiMatteo, Sabato Vigorito, Bario Mascitti, Robert Voulo, Eugene Scafidi, Michael DeLuca, Saverio Carrera and James Napoli, Jr., move to suppress the fruits of electronic surveillance conducted at the premises of apartment 309 at 8-15 27th Avenue, Queens, New York, 161-20 91st Street, Howard Beach, New York, and the HiWay Lounge in Brooklyn, New York, pursuant to court authorization.[1] The grounds alleged in support of their motions are as follows:

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1) that the affidavits submitted in support of the government's request for court authorization of the proposed electronic surveillance failed to show sufficient probable cause;

2) that the affidavits failed to indicate the unlikelihood of success in employing traditional investigative techniques and hence the particularized need for electronic surveillance;

3) that the affidavits and subsequent orders failed to name certain individuals when the government had probable cause to believe that they were involved in the suspected criminal activity;

4) that the government failed to file timely progress reports as directed by the court;

5) that the government violated the minimization requirement as set out in 18 U.S.C. § 2518(5);

6) that the government failed to have the tapes of the seized conversations sealed immediately after the orders' expiration;

7) that the government failed to timely cause service of notice of inventory as required by 18 U.S.C. § 2518(8)(d); and

8) that the surreptitious entry by agents of the

Federal Bureau of Investigation into the subject premises for the purpose of installing and repairing the authorized surveillance equipment, in one instance pursuant to an express court order and in the other case without specific authorization in the court order, was unlawful and therefore, commands suppression.

The seized communications at issue were intercepted pursuant to two sets of court orders. On December 8, 1972, Judge Judd signed an order authorizing the initiation of electronic surveillance in apartment 309 at 8-15 27th Avenue, Astoria, Queens, N. Y. (hereinafter referred to as 309 I). F.B.I. agents effected entry by use of a passkey that same day, and bugging devices were placed in the living room and bedroom areas of the quarters. The premises, leased to one Phyllis Engert, were allegedly being used during daytime hours as a "bank" for the overall policy operation. The 309 I order, covering a period of fifteen days[2] expired 10:00 a.m. on December 25, 1975. An extension order (hereinafter referred to as 309 II) was signed on January 15, 1973 by Judge Weinstein thereby permitting continued surveillance. That order expired on January 31, 1973. Yet, three weeks later, on February 20, 1973, Judge Rosling signed another order (hereinafter referred to as 309 III or 91st Street)

allowing further surveillance at 309 and the institution of a wiretap at the home of defendant Scafidi on 91st Street in Howard Beach. During the periods not covered by court order, no interceptions were made.

The electronic surveillance at the HiWay Lounge in Brooklyn, New York, was conducted pursuant to a second set of three court orders. Surveillance at the HiWay for fifteen days was authorized by Judge Bartels on April 12, 1973 (hereinafter referred to as HiWay I). While covert activity was contemplated by the government in order to effect installation of the listening devices, the order contained no explicit provision authorizing night-time entry by government agents. The court, however, was not without knowledge as to how placement was to be effected. When the affidavits in support of HiWay I were presented to the court for consideration, Judge Bartels inquired as to the government's plans for installation. Special Attorney Barlow informed him that agents were going to surreptitiously enter the premises that evening and emplace microphones under the bar and in the back room.

The HiWay I order expired on April 30, 1973. Monitoring agents at that time had information of an impending meeting that was to take place on May 3, 1973, the content

of which they wanted to intercept. Hence, Special Attorney Barlow immediately flew to Washington seeking the Attorney General's authorization for an extension order. On May 2, however, it became apparent that the supporting affidavit and proposed order would not be ready for presentation to the court until the following day. Monitoring agents were presented with a problem; the devices installed were battery operated, and the batteries had gone dead. In order to ensure interception, the agents appeared before Judge Judd on May 2nd and secured an order authorizing entry that night enabling them to repair the spent devices. The following day, May 3, 1973, Judge Bartels signed an extension order (hereinafter referred to as HiWay II) and monitoring was reinstated. HiWay II was also to cover a fifteen day period; hence, expiration occurred on May 21, 1973. The agents, however, had not completed their investigation and desired a further extension order that would carry them into June. On May 24, 1973 Judge Neaher issued a twenty day order extending the monitoring period. Upon expiration on June 16, 1973, all surveillance ceased.[3]

Title 18 U.S.C. § 2518 recites a highly detailed set of requirements that must be followed with respect to the content of applications for court ordered electronic sur-

FPI-MI -12 5-75-10M 4827

veillance, the bases upon which an order is to issue, the conduct of the surveillance and its termination. In short, the procedures demand that proper authorization of the application by the Attorney General be secured; that the application demonstrate the existence of probable cause to believe that an enumerated crime[4] has, is, or is about to be committed at a particular location and that surveillance will result in the interception of conversation concerning that crime; that it be shown why other investigative techniques are unavailable or would be unavailing; that certain sealing, minimization, and inventory procedures are followed; and that the content of court order, if it is to issue, strictly delimit the conduct of the interception operation. Defendants argue that the government, having failed to meticulously subscribe to these requirements, should be barred from introducing the fruits of its surveillance operations.

A. Probable Cause

Pursuant to 18 U.S.C. § 2518(3), a court order authorizing the interception of wire or oral communications is to issue only if the application recites facts that show:

(a) there is probable cause for belief that an individual is committing, has committed, or is about

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to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Defendants argue that the affidavit submitted in support of the 309 I order (Exhibit C) failed to recite a sufficient basis showing that Apartment 309 was being utilized in connection with a scheme violative of 18 U.S.C. § 1955. The movants contend that the premises were leased to a young woman, Phyllis Engert, against whom there was no allegation of any involvement in a gambling enterprise. They maintain that only on a single occasion was one of the defendants (Russo, later determined to be Mascitti) observed entering

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the subject premises. Such, they submit, was perfectly consistent with the actions of a married man visiting his girl friend during midday. The defendants, however, fail to take note of several facts.

On September 13, 1972, an individual thought to be named Russo (in fact, however, defendant Mascitti) was seen discarding a large brown paper bag in a trash can on Devoe Street in Brooklyn. The affidavit recited that a short time later, the bag was retrieved by FBI agents who had the can under constant surveillance. Subsequent analysis by laboratory experts at the FBI revealed that the materials recovered were of the type associated with a professional policy operation. On at least eight occasions after that time, Mascitti was seen carrying or passing to another, a bag similar in nature to the one discarded. Moreover, Mascitti was seen on several occasions consulting with known participants in policy operations.[5]

On November 14, 1972, Mascitti was identified entering Apartment 309 at 8-15 27th Avenue, Astoria, at approximately 4:15 p.m. The following day surveillance indicated that Mascitti's car had been parked in front of the same premises at about 4:20 p.m., Mascitti himself was seen leaving the building at 6:18 p.m. On each of the next three days, he

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was again seen entering the premises at approximately the same time: 4:15-4:20 p.m. And on November 20, 1972, the next day the premises were under surveillance, Mascitti was again identified specifically entering Apartment 309 with a key. A similar connection was established between the person believed to be Rossetti (later determined to be defendant DiMatteo) and Apartment 309. Physical surveillance detected him either entering or departing the building housing the apartment on at least three occasions, twice in the company of Mascitti. A check of Rossetti's arrest record revealed nine arrests for violations of the gambling laws.

Moreover, the affidavit recited that a confidential informant, who on at least twenty occasions had provided information to the FBI leading to the conviction of two and the indictment of seven persons for violation of gambling laws, told affiant of personal conversations with defendant Mustaccio during the period extending from November 14 to November 28, 1972, wherein Mustaccio admitted his continued participation in the accounting operations of policy offices.[6] Mustaccio, on numerous occasions had been seen in the company of Mascitti and DiMatteo.

Affiant had at the time of the investigation over two and one-half years experience in investigating gambling

operations and had been involved at least one and a half years with the investigation resulting in the instant indictment. It is common knowledge among experts that the policy number for each day is determined by the total amount bet at the designated racetrack. Post time of the last race during November is approximately 3:30 p.m. Such scheduling, which demands a number be bet before that time, might well yield a timetable where the last policy slips of the day are taken to the "bank" to verify "hits," or winning numbers, at approximately 4:00 to 4:30 p.m. daily. That was the time Mascitti was seen entering either Apartment 309 specifically, or 8-15 27th Avenue on at least five occasions.

In United States v. Mainello, 345 F. Supp. 863 (E.D.N.Y. 1972) a similar question as to the sufficiency of the affidavit was presented. There the court found probable cause to support a court order for electronic surveillance where the affidavit recited that agents made the following observations: exchanges of envelopes among the defendants; people entering and leaving the subject premises at a given time each day; and that the persons surveilled had previous ties with gambling. Also, Agents had received information from credible and reliable informants confirming the subject persons' continued gambling activitics. Many of the same

indices are present in the instant matter.

Moreover, the affiant's experience in gambling investigations must be considered in evaluating the sufficiency of the affidavit. See United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), rehearing denied, 506 F.2d 1056 (5th Cir. 1975), cert. denied, 421 U.S. 913, 95 S.Ct. 1568 (1975). Affiant had several years of experience and was fully familiar with policy operations. Credence, therefore, must be given to his recited timetable of a policy operation's daily activities and its relation to the individuals' movements perceived by surveilling agents. Mascitti's constant association with known gamblers, the witnessed carrying and passing of plain bags similar in nature to the one recovered containing policy paraphernalia, and his frequent entry into the subject premises minutes after post-time of the last race is a sufficient basis for a finding of probable cause to believe that Apartment 309 was being used as a "bank" as recited in the 309 I order.

Movants also contest the sufficiency of the February 20, 1973 affidavit (Exhibit G) submitted in efforts to secure wiretap authorization for the phone belonging to defendant Scafidi at 161-20 91st Street, Howard Beach, New York. Defendants allege that no adequate connection is shown

between the phone and a violation of 18 U.S.C. § 1955 to support a finding of probable cause. The court disagrees.

Exhibit G incorporates and makes specific reference to the affidavit of January 18, 1973 (Exhibit F) wherein it is recited that during the period extending from December 21, 1972 to January 9, 1973, Scafidi's number was dialed from Apartment 309 some twenty times. Moreover, all calls fall into a pattern consistant with illegal policy practices; none were made prior to 4:25 p.m. This neatly fits into the time-table heretofore mentioned wherein the daily number is not determined until that time. Scafidi, as described in the affidavit of May 1, 1972 (Exhibit B), incorporated by reference into Exhibit G, had been arrested at least twelve times since 1966 for the possession of gambling records. Reference was further made to the fact that Scafidi was a frequent visitor to the premises located at 967 East 2nd Street, Brooklyn, New York, which after a search pursuant to a warrant on May 1, 1972, was found to be a policy bank. Moreover, during the period extending from December 1972 through January 1973, physical surveillance indicated that Scafidi continued to remain in continuous contact with Mustaccio. The court therefore finds this factual showing constitutes sufficient probable cause to support the wiretap authorization issued

February 20, 1973.

Defendants also challenge the sufficiency of the April 12, 1973 and May 3, 1973 affidavits submitted in support of the HiWay I and II orders. The affidavits, either facially or by previous applications incorporated therein, outlined statements supplied by informants concerning the existence of an extensive gambling operation in the New York-New Jersey metropolitan area. The April 12 affidavit in particular, recited information provided by seven confidential informants chiefly indicating that several of the defendants, who allegedly held managerial positions within the enterprise, met regularly at the HiWay Lounge. The informants, who on several occasions witnessed the meetings, stated that James Napoli, Sr. controlled the operations. It is the defendants' position that the informants' statements were unreliable, stale, and constituted double hearsay. They argue that their consideration on the issue of probable cause was improper.

The recitation of the information relayed by each informant was always preceded by an explanation of factual basis supporting the affiant's claim as to their reliability. In the past they had provided information either subsequently proven credible, verified by independent investigation, or corroborated by other informants. The reliability of the

informant is demonstrated. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964).

While double hearsay detracts from the trustworthiness of the information, it must be noted that the informant's statements proffered here were not relayed through other informants, but were made either directly to the affiant or to other agents under affiant's command. A finding of reliability and consequent probable cause need not rest on the fact that the informant's statement was transmitted by a government official to the affiant. United States v. Smith, 462 F.2d 456, 458-59 (8th Cir. 1972). Yet when the underlying circumstance envisions a chain of hearsay through an agent, greater assurances exist as to the reliability of the information. United States v. Fiorella, 468 F.2d 688, 691-92 (2d Cir. 1972), cert. denied, 417 U.S. 914, 94 S.Ct. 2622 (1974).

Defendants' further allegation of staleness since much of the information contained in the affidavits was obtained far in advance of their preparation, must also be rejected. It must be remembered that the investigation resulting in these indictments extended over a period of well in excess of two and one-half years. Age alone does not devalue information; its timeliness is more a function of subsequent

corroboration. Later information serves to verify the defendants' continued involvement in gambling activity and the ongoing nature of the policy operation. Therefore, the court concludes that the information is not so stale as to render it unreliable.

The informants' statements were further corroborated by voluminous reports of visual and electronic surveillance sketching a vast and highly organized pattern of activity chiefly centered around the HiWay Lounge. Periodic surveillance of James Napoli, Sr. evinced an almost rigorous schedule whereby he would be seen departing his residence daily at noon and traveling directly to the HiWay Lounge where he would remain until 5:30 or 6:00 p.m. Napoli, Sr. did not "drink" alone. Almost daily, defendants Bascetta and Napoli, Jr. were seen biding their time at the lounge with the elder Napoli. Others visited with less frequency, but defendants DeLuca, Mascitti and DiMatteo were detected on several occasions drinking and conversing at the HiWay Lounge with the Napolis and Bascetta. Of particular import is the fact that while the bar remained facially open to the public, few residents of the locality were seen entering the premises. Moreover, the content of previously intercepted conversations seemingly support a conclusion that the frequent fraterniza-

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tion amongst defendants was not innocent. The recited communications, reflecting what transpired at meetings between defendants, are replete with language commonly used within gambling circles. Therefore, the corroboration that both visual and electronic surveillance provided the statements of informants lead the court to find that sufficient probable cause was shown to support the HiWay I and II orders.[7]

B. Particularized Need for Electronic Surveillance

Title 18 U.S.C. § 2518(3)(c) provides, in pertinent part, that no order authorizing electronic surveillance is to issue unless the court determines, on the basis of facts submitted by the applicant, that

> normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Defendants attack the sufficiency of the applications as to this requirement in two respects: that it fails to negate the availability of further informant assistance and that the attempted showing is purely conclusory and a sufficient factual basis is not outlined. The court disagrees. In short, the various affidavits detailed many facts supporting the necessity of employing electronic surveillance to further the considered criminal investigation.

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It must be remembered that the subject of the investigation was illegal gambling activity; the particular targets being upper echelon figures who managed and directed the illicit enterprise. The effectiveness and availability of other investigative methods must be evaluated in this light. Three other alternatives were open to government agents: informants, physical surveillance, and search and seizure. The affidavits revealed that all three were tried, proved successful to a limited extent, but were ultimately unavailing.

Contrary to defendants' assertions, the affidavit sworn to by Agent Canalez (Exhibit A) dated April 1970, incorporated into the December 8, 1972 application and those subsequent thereto, flatly stated that informants were unwilling to come forward and testify for fear of personal safety. Thus, while the information may serve a useful purpose as an investigative tool, it still must be distinguished from prosecutable evidence. Moreover, the informant data reported in the April 12, 1973 application (Exhibit H), while sufficient to support a finding of probable cause, was not of the quality necessary for a successful prosecution of Napoli, Sr. The information provided by seven of the eight informants came predominantly from co-conspirators, and does not consti-

tute the direct evidence necessary to support a conviction of the elder Napoli. See United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969). Physical surveillance served only to provide the government with the identity of certain suspects and established evidence of illegal activities only against low level members of the operation. Even though visual surveillance confirmed the fact that frequent meetings took place at Apartment 309 and the HiWay Lounge, the close knit nature of the managing group and the omnipresence of a lookout at both locales precluded infiltration by undercover agents. Thus, the value of physical surveillance was limited; it could not be expected to, and did not produce the evidence of criminal activity by upper echelon personnel who exclusively conducted their business orally.

Similarly, the several searches conducted, either pursuant to a warrant or of abandoned property, yielded very little in terms of prosecutable evidence. The retrieval of policy slips from Mustaccio's trash can, from the trash can on Devoe Street where Mascetti discarded them, and from the truck driven by Riccardi failed to incriminate upper level suspects. Likewise, the raid on the suspected "bank" on May 1, 1972 led to the seizure of gambling paraphernalia that only served to indicate the extensiveness of the scheme, but failed to identi

upper echelon executives.

These detailed accounts set forth in the affidavits depict an exhaustive investigation in which the return on the investment of time and energy was relatively small; it hardly consitutes mere conclusory allegations. Only electronic surveillance could be expected to produce the evidence needed to prosecute those heads who conducted their business secretly, insulating themselves from hard evidence.

Defendants cite United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975) in support of their contention. There, the court found that the affidavits failed to show a particularized need for electronic surveillance where the "factual statements" proffered by the affiant were couched in terms of mere probability and were based on conclusions derived from the government's experience in investigating other gambling cases. Such, however, is not the case here.

The statutory requirement that "normal investigative procedures be first exhausted" must be reviewed in a practical and common sense fashion. United States v. Armocida, 515 F.2d 29, 37 (3d Cir. 1975); 1968 U.S. Code Cong. & Admin. News 2112, 2190. See also United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965). The purpose behind section 2518(3)(c) is not to foreclose the use of electronic sur-

veillance until every other investigatory means has been unsuccessfully attempted, but simply to inform the court of the difficulties involved with conventional techniques. United States v. Robertson, supra, at 293. Indeed, the very words of the provision itself do not require that all investigative procedures be exhausted before application is made for electronic surveillance. This court believes that affiant and the authorizing judges complied fully with the letter and spirit of this provision.

Affiant had several years experience investigating illicit gambling operations and was fully familiar with the practical problems presented by the use of conventional investigative techniques. Yet, unlike Kalustian, his applications were not couched in terms of general probabilities. Rather, they are replete with facts outlining the specific failings that resulted in the instant case from the use of traditional techniques. The applications of December 8, 1972 and April 12, 1973 specifically note the limited evidence gathered by the use of physical surveillance and searches and seizures, as well as the impossibility of securing in court testimony from confidential informants. The court finds these allegations sufficient to satisfy the requirements of 18 U.S.C. § 2518(3)(c).

C. Failure to Name Certain Defendants in the Order

Defendant DiMatteo asserts suppression is mandated when the government, although having knowledge of his identity prior to December 8, 1972, chose instead to refer to him as "an individual believed to be Pasquale Rossetti" in the affidavit submitted in support of the 309 I order. DiMatteo's argument is specious.

When surveillance commenced again in September 1972, only defendants Mustaccio, Riccardi and Scafidi had been definitely identified as a result of previous searches and seizures. The name Rossetti had been determined only by reference to the registration of the car with license plate number QH5287 which had been spotted several times during physical surveillance in the vicinity of 8-15 27th Avenue. In fact, affiant can be seen to have displayed reservation in making a definitive identification when he referred in the affidavit to a person "believed to be Pasquale Rossetti." DiMatteo's reliance therefore on United States v. Donovan, 513 F.2d 337 (6th Cir. 1976), cert. granted, U.S. , 96 S.Ct. 1100 (1976), is misplaced. There the court ordered suppression when a subject's identity was specifically determined by the government making him "known" to agents, but he was not named in the intercept order. United States v.

Donovan, supra, at 341. The misnomer involved herein did not deprive the issuing court of the information necessary to exercise strict supervision over communication intercepts.

The particular name, Rossetti, was not material to the showing of probable cause. DiMatteo argues that mention of Rossetti's criminal record in the December 8 affidavit was central to the final probable cause determination. The court disagrees. "Rossetti's" companionship with Mascitti and his pattern of frequenting the building in which Apartment 309 is located between 4:30 and 6:00 p.m. constitute a sufficient showing of probable cause to justify the issuance of an intercept authorization inclusive of his name. The recitation of the criminal record was mere surplusage. When deleted from the supporting affidavit there remain facts sufficient to support a finding of probable cause.

That being the case, the question that must be answered is whether the misrepresentation was intentional, for if not then suppression is not mandated. United States v. Thomas, 489 F.2d 664, 668-71 (5th Cir. 1973). The burden of proof, a heavy one at that, lies with the defendant. United States v. Chiarizio, 388 F. Supp. 858, 872 (D.C. Conn. 1975), aff'd, 525 F.2d 289 (2d Cir. 1975). DiMatteo has failed to meet it. Defendant argues that the bag retrieved from the

trash can on Devoe Street on September 13, 1972 contained a piece of paper with DiMatteo's fingerprints on it. This alone, he asserts, should have put the government on notice of the subject's real identity. If the fingerprint was analyzed prior to December 8, 1972, defendant's argument might have some bite. Yet, the fact remains that analysis was not conducted until August 1973, long after electronic surveillance of Apartment 309 was discontinued. The government has shown that identification was determined solely through a motor vehicle registration check. Moreover, as soon as DiMatteo's true identification was learned, the name change was reflected in subsequent applications and court orders. These prompt efforts to notify the issuing judge can only be read to constitute good faith, rendering it clear that the initial misrepresentation was unintentional. As such, suppression is not in order.

Defendant Vigorito argues the failure to name him in the HiWay I and II orders, when it was clear that the FBI had probable cause to believe he was involved in the unlawful enterprise, and that his conversations would be intercepted at the subject premises, commands suppression. It is Vigorito's position that since he was intercepted three years prior during a surveillance operation at the HiWay Lounge in 1970,

he was known to government agents prior to the submission of the April 12, 1973 affidavit in support of the HiWay I order. Such hardly constitutes sufficient identification. Moreover, the issue is not mere identification; the more appropriate question is whether there was probable cause to believe Vigorito was violating 18 U.S.C. § 1955 and that his conversations would be intercepted at the lounge. The affidavit of April 12 described an extensive network of visual surveillance that took on a wide scope, yet no observations of Vigorito were noted. Likewise, the informant data outlined evinced no reference to defendant. In short, nothing was presented to support a probable cause determination with respect to Vigorito.

Vigorito's contentions take on a different tone, however, as they refer to the May 3rd application for the HiWay II order. He was seen to enter and remain in the lounge at least six times during the period extending from April 19 through April 26, 1973. Yet, this fact alone is not a sufficient basis upon which to rest a probable cause determination. The very wording of the statute indicates that probable cause must be shown that a subject's conversations will be intercepted. Agent Parson, in his testimony at a hearing on the matter, pointed out that Vigorito was always

placed at the front of the lounge acting as a lookout. Given the fact that both bugs were placed in the back room, there was justifiably little expectation that any of his conversations would be seized. Indeed, monitoring agents expressed surprise when in fact Vigorito's voice was recorded on April 30, 1973, the day HiWay I was to expire.

By that day, the affidavit for the HiWay II extension order had already been drafted. As it was, supervising officials were seeking to act as expeditiously as possible in their attempts to secure an extension order and thus intercept the content of an impending meeting scheduled to occur on May 3rd. If forced to change the suspects denominated in the order, timely authorization would not have been forthcoming. Affiant did not hide the fact of this seized conversation from the court. It was brought to Judge Bartels' attention. The government's position as asserted then remains sound; since the HiWay II authorization was an extension order, the FBI needed probable cause to believe that Vigorito's conversations would continue to be intercepted. The seizure of the single conversation does not warrant a finding of probable cause to believe that Vigorito's subsequent conversations would be seized by the bugging device. Vigorito's claims of statutory violations in the applications for the HiWay I and II

orders are rejected.

D. Failure to File Timely Progress Reports

The orders authorizing monitoring at Apartment 309 and the HiWay Lounge all required the government to file progress reports on the fifth and tenth day of each order with the court outlining the degree of success in achieving the authorized objectives and the need for continued surveillance. Defendants do not attack the sufficiency of the reports, but argue suppression is required because of the government's failure, on several occasions, to file timely reports.[8]

There is no statutory requirement that progress reports be submitted throughout the course of electronic surveillance. The matter is left purely to the discretion of the issuing judge. United States v. LaGorga, 336 F. Supp. 190, 194, amended, 340 F. Supp. 1397 (W.D. Pa. 1971); United States v. Falcone, 364 F. Supp. 877, 888 (D. N.J. 1973), aff'd, 500 F.2d 1401 (3d Cir. 1974). They are intended to serve as a check on the continuing need for surveillance, affording a means by which the court can conduct a post hoc review. The reports provide but one way to insure that extended surveillance is not lightly undertaken. 1968 U.S. Code Cong. & Admin. News, supra, at 2193. The government's failings,

therefore, must be viewed in the context of this underlying purpose.

The fact that other procedures remain available that would serve the same review function, and thereby guard against unwarranted extensions, mitigates against imposing the harsh penalty of suppression where the government fails to pay heed to a court order. While progress reports play an important role in insuring compliance with the orders authorizing interception, the supervisory power of the court is exercised before continuation orders are issued. The statutory purpose is not served by suppressing conversations otherwise lawfully seized. See United States v. Giordano, 416 U.S. 505, 528, 94 S.Ct. 1820, 1832 (1974).

Both the 309 and HiWay orders limited the surveillance period to fifteen days, far less than the length of time permitted under the statute. This obviously required the government to submit lengthy affidavits in support of an extension order outlining their success to that point and justifying the need for continued surveillance. Hence, the ultimate purpose was served when close scrutiny was given applications for extension orders. Moreover, the threat of civil penalty still existed furnishing a preventative against unlawful disclosure. There is no contention directed at the sufficiency

of the reports filed. No allegation is made that the court was misled as to the need for continued surveillance.

As well, secondary review by the trial court, pursuant to suppression motions, provides the necessary safeguards. The court has the benefit of hindsight, affidavits, logs, transcripts, and supplemental testimonial evidence in making its determination as to whether surveillance was appropriately extended. This would seem to support Congress' decision not to make mandatory the reports in the first instance.

The government's investigation was aimed at a continuing conspiracy. The January 15, 1973 affidavit (Exhibit E) noted that physical surveillance revealed that suspects continued to frequent the building housing the subject apartment. The recitation of conversations intercepted until that point evinced only a single reference to Napoli, Sr., the chief target of the investigatior. Obviously, more was needed in terms of prosecutable evidence; extended surveillance was therefore justified. Interception continued to be fruitful. The wiretap evidence gathered pursuant to the 309 II order clearly indicated that the apartment was still being used as a policy bank, and that the conversations seized further implicated the defendants in a criminal conspiracy. Hence the

issuance of the 309 III order (which included the 91st Street tap) was proper. The issuing court was fully apprised of all the information garnered under previous orders, and the government fully justified its need and the appropriateness of continued interception. The ultimate purpose theoretically underlying the progress reports was served, and the government's failure to timely file progress reports does not warrant suppression.

Minimization

Defendants move to suppress evidence seized pursuant to the HiWay I order on the ground that monitoring agents violated the terms of the order calling for minimization of the seizure of non-pertinent conversations.[9] A minimization hearing was conducted by the court relating to these tapes prior to the trial of United States v. Saccone, et al, 76-CR-62 (E.D.N.Y. 1976). Defendants' counsel participated in that hearing (See Memorandum of Decision dated June 7, 1976). Additional testimony was heard with specific reference to the instant case on July 1, 1976. The evidence adduced at both hearings indicates that Supervising Agent Parsons[10] and Special Attorney Barlow gave detailed instructions to monitoring agents prior to the initiation of surveillance. In essence the instructions provided that:

(1) Monitoring was to commence only when one of the named subjects entered the premises, and was to continue only so long as one of those subjects remained in the premises.

(2) If conversations of crimes other than those enumerated in the order were heard, they were to be seized and immediately reported to the supervising agent.

(3) When conversations of persons other than named subjects were overheard, monitoring agents should listen only so long as to determine whether the communication concerned gambling activity, and only then should monitoring continue.

(4) When it was apparent that intercepted conversations were innocent or privileged, monitoring should immediately cease. Intermittently, agents were to return to the conversations to see if their character changed.

Pursuant to the April 12, 1973 HiWay I order, two bugging devices were planted in the premises, both in the rear area of the lounge. Monitoring agents with their receiving and recording equipment were housed in a van parked directly outside of the premises. They were supported by visual surveillance. Each agent was fitted with headphones running from the receiving sets. Before them, they had a

master on-off switch that controlled both the recording and receiving devices as well as a set of independent switches.

The testimony adduced at the hearings indicated that agents would listen to and record only subject conversations, immediately shutting down the recording equipment when the nature of the conversations changed. Receiving devices would remain on, but agents would remove their earphones when non-pertinent conversations were detected. From time to time, they would pick up their headsets only long enough to determine if the conversation reverted back to criminal involvement.

Whether minimization requirements have been complied with must be evaluated against a standard of reasonableness. Facts asserted to justify the period and scope of surveillance can only be analyzed on a case by case basis. United States v. James, 494 F.2d 1007, 1018 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020, 95 S.Ct. 495 (1974), 1968 U.S. Code Cong. & Admin. News, supra, at 2190. The crucial question to be answered is whether "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion," United States v. Totorello, 480 F.2d 764, 784 (2d Cir. 1973), cert. denied, 414 U.S. 866, 94 S.Ct. 63 (1973).

While statistical details of intercepts are not in

and of themselves determinative on the issue of minimization, they do provide a starting point for analysis of the government's monitoring procedures. United States v. Armocida, supra at 43. The government claims that a line by line analysis of seized conversations reveals that of 91.1% of the matters intercepted were pertinent. Of the 8.9% considered non-pertinent, there is question still as to 1.6% in that they may be clouded by gambling jargon. Without more, this seems to indicate that at least a substantial effort was made to minimize seizure of innocent communications. See United States v. Armocida, supra, at 43.

Among the other factors that ought to be considered in determining whether the minimization requirement has been met are the scope of the criminal enterprise and subject investigation, the type of premises to be surveilled, and the expected content of the interceptions. United States v. James, supra, at 1019-21. Where, as here, the scope and locale of the enterprise extends far and wide and many participants constitute the conspiracy, obviously it will be necessary to monitor with greater intensity than if the scope were more limited. Likewise, where participants act with great circumspection, as here, standards of reasonableness dictate that monitoring must be significant to ensure evidence

of criminality is gathered. The nature of the premises involved also mitigates against more limited surveillance. While it remains a "public establishment," it is quite clear little legitimate business is conducted there rendering infiltration by undercover agents almost impossible. The attempts defendants made to secret their transactions and conduct most managerial meetings at the lounge gave the government good cause to expect that most of the conversation seized there would revolve around gambling activities.

It is inherent in the type of surveillance authorized here that certain non-pertinent conversations would be intercepted. This, however, should not vitiate otherwise valid electronic surveillance. The uncertainty and unpredictability of criminal conversation makes perfection impossible. Before a determination of innocence can be made, there is a likelihood of the seizure of impertinent conversations. Where agents listened only long enough to determine whether it was conversation they were authorized to intercept and recorded only those pertinent conversations, the interception of communications not otherwise within the purview of the court order does not mandate suppression. United States v. [illegible]num, 485 F.2d 490, 500 (2d Cir. 1973), cert. denied, U.S. , 96 S.Ct. 357 (1975). The procedures employed by

the government were designed to minimize the seizure of impertinent conversations and were surely reasonable under the circumstances involved herein. United States v. Doolittle, 507 F.2d 1368, 1372 (5th Cir. 1975), aff'd, 518 F.2d 500 (5th Cir. 1975).

Sealing

Title 18 U.S.C. § 2518(8)(a) provides in pertinent part:

> . . . Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.
>
> . . .
>
> Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Defendants raise the claim that the government's failure to fastidiously adhere to the mandate of section 2518(8)(a) - that tapes be presented to the issuing judge immediately upon expiration of the order, or extensions thereof - requires the

evidence be suppressed. The dates of sealing with relation to the termination dates of the respective orders are as follows:

Order	Date Issued	Date of Expiration	Date Sealed	Delay
309 I	12/8/72	12/25/72	1/16/73	22 days
309 II	1/15/73	2/1/73	2/5/73	4 days
91st St.	2/20/73	3/9/73	3/16/73	7 days
HiWay I	4/12/73	4/30/73	5/3/73	3 days
HiWay II	5/3/73	5/21/73	5/24/73	3 days

The obvious underlying purpose of the sealing requirement is to ensure the accuracy, authenticity and integrity of the tape recordings of seized conversations. United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976); 1968 U.S. Code Cong. & Admin. News, supra, at 2193. The provision is but part of a broader congressional plan to limit the use of electronic surveillance to those instances where it is most necessitous. United States v. Giordano, supra, at 527, 94 S.Ct. at 1832.

In United States v. Gigante, supra, the Second Circuit addressed the same general issue as that raised by defendants herein. There, the Strike Force, as part of its investigation of illegal gambling operations, obtained a series of seven

court orders authorizing the installation of wiretaps on nine telephones throughout the metropolitan area. The tapes made pursuant to the latter six orders were inexplicably retained by government agents for excessively long periods of time - anywhere from eight months to over one year - before they were submitted to the authorizing judge for sealing and custodial directions. The court ordered the evidence suppressed.

Rather than basing its directive on the omnibus suppression provision in the act, 18 U.S.C. § 2518(10)(a),[11] the court in Gigante drew on the express terms and underlying purpose of the subject provision and held that section 2518 (8)(a) offered an independent basis for exclusion. They reasoned that if the sealing requirement was to provide a viable external safeguard against tampering or manipulation, the burden had to be placed on the government to either immediately submit the tapes for sealing or proffer a satisfactory explanation of its dereliction. To subsequently demand that defendants introduce evidence of actual alteration would vitiate Congress' intent that the conduct of electronic surveillance, from its inception to the eventual use of the byproduct, be judicially supervised. The court reasoned that since tapes are "uniquely susceptible to manipulation and alteration," only when they become "confidential court orders"

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is their integrity insured. United States v. Gigante, supra, at 505.

In Gigante, evidence was suppressed as it related to the latter six court orders where the delay was egregious. However, as to recordings derived from the first wiretap order, different circumstances existed and therefore different questions were presented. The delay in sealing the tapes derived from the first order was somewhere between 6 and 37 days. Confusion remained as to whether one of the subsequent court orders was but a mere extension of the first. Since section 2518(8)(a) requires submission to the authorizing judge "immediately upon expiration of the order, or extensions thereof," the Court of Appeals found it necessary to remand this aspect of the case back to the district court in order to determine whether the subsequent order was in fact an extension of the first and, if so, whether the reason for the delay in obtaining the extension (the hiatus between the expiration of the first and the signing of the "extension" being two weeks) was sufficient to excuse the delay in sealing.

The clear import of the court's remand in Gigante is a construction of section 2518(8)(a) whereby an attempt to secure an immediate extension of an initial intercept order will serve to defer the sealing requirement. See Id. at 507-08.

F.N. 11. Such a conclusion is perfectly consistent with the primary thrust of the court's pronouncements. If upon expiration of the initial order immediate steps are taken to procure an extension, or if there is a delay in acting, a satisfactory explanation is offered, then the same purpose to be served by the statutory prerequisites of immediate sealing or an explanation of omission is accomplished. Inherent in the review process that surrounds the issuance of an extension order is the same external safeguard against manipulation and tampering. Whatever prosecutable evidence is gathered pursuant to the initial surveillance order will obviously be included in an application for extension. In order to show there is sufficient probable cause to justify continued surveillance, a transcript of previously seized conversations will be incorporated into the subject application. Here, specifically, all incriminating conversations were so denoted. Once a record is before the court subsequent alteration is easily detected. As such then, the authorizing court's review serves the same prophylactic function as does sealing and provides the necessary bulwark against alteration.

The first question that must be answered, therefore, is whether the 309 and HiWay series of orders ought be construed as initial intercept authorizations followed by exten-

sions. Although the word does not explicitly appear in the text of the affidavits offered in support of the orders, testimony indicated that the Department of Justice policy was to use the word "continued" to denote "extension." True, while the government's policy is not determinative, it is at least evidence of the intended scope of the surveillance and due weight must be accorded it. The applications are replete with language evincing an attempt to secure authorization for continued interceptions; reference is made to crimes the subjects "are continuing to commit" and further conversations they sought to intercept by "continued surveillance." More important is the fact that the orders sought were not to include new subjects, and the affidavit recited in detail the conversations seized under each previous order. The mere fact that the 309 III order additionally authorized the implementation of a wiretap on defendant Scafidi's phone should not alter the essential character of the order as it relates to the issue of the integrity of the tapes. The expiration of that order was not followed by a further extension. Hence, the sealing was the backstop to insure against alteration. See United States v. Wac, 498 F.2d 1227 (6th Cir. 1974).

United States v. Wac, supra, dealt with the question of what constitutes an extension order. The court there held

that where the second intercept application was not specifically denominated as one for an extension order, but was filed immediately upon expiration of the first, related primarily to the same persons and locations, and where conversations overheard under the first order were "essential in fact" to the issuance of the second, that second order is appropriately deemed an extension. The subsequent 309 and HiWay orders are, therefore, most appropriately extensions. They related to the same persons and virtually the same locations as the initial order. More importantly, their issuance was chiefly grounded in conversations heard under the previous orders. To find them extensions we need not go as far as the court did in Wac where the subsequent orders included additional subjects and new locations.

Having found the HiWay II as well as the 309 II and III orders to be extensions, this court must determine whether the delays in securing some of the extensions were justified. During an evidentiary hearing conducted on all of defendants' motions to suppress, Special Attorney Barlow, who supervised the investigation for the Strike Force, testified on this issue. He recounted that wherein the 309 I was to expire December 25, 1972, he forwarded the affidavit and application for the 309 II order to Washington for the Department's

approval during the last week in December. Due to the delay of the holiday mails, it did not arrive in Washington until January 2, 1973. The Attorney General's approval was not forthcoming until January 12, 1973, a Friday. The government secured Judge Weinstein's approval at the earliest possible time, i.e. Monday, January 15, 1973. As per Barlow's instructions to have the tapes sealed immediately after an extension order was secured, Agent Parsons had the 309 I tapes sealed the following day, January 16, 1973. A similar scenario developed with respect to the 309 III order; the papers were sent to Washington the last week in January during the term of the 309 II order, arrived there February 1, 1973, but approval did not come for some time resulting in the eventual signing of that order on February 20, 1973. Barlow testified that the delays were unexpected; his previous dealings with Washington found the approval of extension orders to take generally no longer than two to four days.

This court finds, therefore, that the sealing of the 309 I and II tapes, having been effected before the expiration of the 309 III extension was sufficient to satisfy the requirements of section 2518(8)(a). Barlow's efforts to be timely were in good faith and his explanation of the delay in securing the 309 II and III orders was satisfactory.

With respect to the sealing of the 309 III (91st St.) tapes, a slightly different question is presented. The 309 III order expired on March 9, 1973. Yet the tapes were not sealed until March 16, 1973, a full week later. Barlow testified that he was preparing for a trial during that week. The testimony of Agent Parsons recounted the security measures taken to preserve and ensure the authenticity of the tapes. Immediately after a day's surveillance, monitoring agents turned the tapes over to Agent Parsons who, after making a duplicate, would put the tapes in a locked cabinet within his office. Only he retained a key. The originals were not removed until taken before the court for sealing. All defendants were expressly invited by the court to make affirmative showings of alteration, but absolutely no evidence was introduced indicating even the slightest hint of tampering. The sealing one week after the expiration of the subject order was not done with the intent to evade statutory requirements or gain a tactical advantage. The government sustained its burden of showing that the integrity of the tapes was preserved. The requirements of section 2518(8)(a) with regard to the 309 III tapes were met.

The issue is less difficult with respect to the HiWay I and II tapes. Both the applications and orders with respect to HiWay II and III refer to "continued interception

of oral communications." The subjects denominated were the same throughout as was the location to be surveilled. HiWay II was an extension of HiWay I and HiWay III an extension of HiWay II. Moreover, the government acted with all expeditiousness in securing the extensions. Testimony indicated that the three day delay in presenting the affidavits for HiWay II were again the result of a backup in Washington. Therefore, since tapes from HiWay I and II were sealed before the expiration of the last extension order, we conclude that the prerequisites for disclosure under section 2518(8)(a) have been met.

Notice of Inventory

Title 18 U.S.C. § 2518(8)(d) requires that notice of inventory be served within ninety days after expiration of an intercept order or extension thereof. The subsection further provides, however, that upon an ex parte showing of good cause, service may be postponed by the court. Pursuant to this excepting proviso, Judge Judd on March 22, 1973, 89 days after the expiration of 309 I, directed that service of inventories for the entire 309 series of orders be postponed until June 22, 1973. Service, however, was not made on that date. On September 13, 1973, 89 days after the expiration of the HiWay III extension order, service of inventories for both the 309 and HiWay series of orders was effected. Defendants

argue that the government's failure to timely serve notice of inventory requires suppression of the evidence.

Having already found that the HiWay II and III orders were mere extensions of HiWay I, service of notice as it related to the HiWay tapes was timely; it was made within 90 days of the expiration of the last extension. A question however remains concerning the late service of the 309 inventory.

Section 2518(8)(d) is but part of a broader statutory scheme designed to vest the judiciary with supervisory powers to control the use of potentially abusive electronic surveillance techniques. More narrowly, it reflects the existing inventory and notice system for conventional search warrants contained in Rule 41, F.R.Cr.P., 1968 U.S. Code Cong. & Admin. News, supra, at 2194. It further serves to assure the populus that techniques are properly employed. By causing notice to be served at least the subject will know of the existence of intercept operations. As such he can seek appropriate redress if there has been an unlawful invasion of privacy. United States v. Chun, 503 F.2d 533, 539 (9th Cir. 1974).

The circuits are divided over whether the failure to give the statutory post-seizure notice requires suppression absent a showing of prejudice. This circuit demands such a

showing. United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944, 94 S.Ct. 3069 (1974). We are not unmindful, however, that Rizzo was decided before United States v. Giordano, supra, and its companion case, United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849 (1974). Some question lingers as to whether the holdings of these cases will undercut this circuit's position announced in Rizzo. As the Second Circuit pointed out in United States v. Principie, 531 F.2d 1132, 1141 (2d Cir. 1976), the argument would be that suppression is mandated even absent a showing of prejudice when the statutory provision violated plays a "central role in the statutory scheme." United States v. Giordano, supra, at 528, 94 S.Ct. at 1832. Both the Fourth and Sixth Circuits have ruled that section 2518(8)(d) is a provision of that import. See United States v. Donovan, 513 F.2d 337 (6th Cir. 1975); United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975). Certiorari has been granted in Donovan, U.S. , 96 S.Ct. 1100 (1975). While the Second Circuit has expressed some doubt in the continued validity of the requirement that prejudice be shown owing to the Supreme Court's decision to grant certiorari in Donovan, it has still chosen to adhere to its holding in Rizzo. United States v. Principie, supra, at 1141.

Here no prejudice has occurred from the delay in causing notice to be served. Defendants had notice of inventory more than three years before trial and had transcripts of the seized conversations for more than a year and a half. The absence of prejudice therefore demands that defendants' motion to suppress on this ground be denied.

Surreptitious Entry Into Apartment 309 and the HiWay Lounge

On December 8, 1972, upon issuance of the 309 I order, agents of the Federal Bureau of Investigation surreptitiously entered the subject apartment with a passkey when defendants were absent and installed the authorized bugging devices. Although the order did not expressly provide for covert entry, the authorizing court well knew that bugging devices were to be employed rather than wiretaps. Similarly the April 12, 1973 HiWay I order made no express mention as to the means to be employed by government agents in planting the intercept devices. But the court was not without knowledge that surreptitious entry was planned. Special Attorney Barlow testified that upon submitting the surveillance application to Judge Bartels, the Judge inquired as to how undetected installation was to be accomplished. Barlow told him of their plans to enter that night when no one was present and emplace listening devices in the premises' rear area. The defendants

contend the facial defectiveness of the orders in that they fail to specifically authorize surreptitious entry to install surveillance devices mandates suppression.

Is express authorization to enter premises in order to emplace electronic bugging devices so as to effectuate the purpose of an intercept order necessary, or is such authorization implicit in the grant of the intercept order? Before turning to this inquiry, a determination must be made as to whether the defendants have standing to assert this challenge.

Riddled with inconsistencies and pervaded by nuances, the question of standing to challenge Fourth Amendment violations has often been considered by federal courts. Yet a synthesis of the leading case on the issue, Brown v. United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569 (1973), seems to indicate that standing devolves on a defendant only where he was present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched.

Apartment 309, to which the first series of orders pertained, was leased to a Phyllis Engert, a doctor's receptionist who spent her working day hours away from home. While away, the named subjects, DiMatteo, Mascetti, Mustaccio, Scafidi, and "other yet unknown" carried on their "banking"

operations. That they supplied her with illicit payments only gave them a license to use the premises during the daytime; it did not give them a proprietary interest to challenge nighttime entry. Defendants' alternative contention is likewise without merit. They argue that the continuous nature of electronic surveillance resulting in the seizure of conversations when they were on the premises confers standing to challenge the installation of monitoring devices when they were absent. Two distinct aspects circumscribe any search and seizure question; the means used to gain access to the confines to be searched, and the subsequent seizure itself. United States v. Agrusa, Slip op. at 11 (8th Cir. July 6, 1973). Defendants' claim, however, only involves the first aspect. Since only Engert's rights were arguably invaded by the initial entry, the defendants cannot be heard to challenge its propriety. Hence the court finds defendants Moscitti, Mustaccio, DiMatteo and Scafidi are without standing to challenge the propriety of the FBI's entry to install devices at Apartment 309.

A different situation lies with respect to defendant Napoli, Sr. and his right to challenge the forced entry into the HiWay Lounge. At the suppression hearing had herein, Napoli, Sr.'s sister, Mrs. Pascocello, testified as to the

corporate structure behind the lounge's operations. After her husband's death she requested that Napoli, Sr. undertake the operations of the lounge and parent corporation Ampas Tavern, Inc. Mrs. Pascocello, however, remained corporate head and continued as the sole owner of the HiWay Lounge.

Though Napoli, Sr. used the HiWay Lounge solely for his gambling enterprise, he is not denied standing. His use of the premises for illegal purposes was with the knowledge and consent of the landlord, Mrs. Pascocello. Napoli, Sr. was the sole tenant in possession of the premises. The court finds therefore, that he has standing to challenge the admissibility of the tapes based on the government's surreptitious entry into the HiWay Lounge on the two occasions, i.e. prior to the interceptions pursuant to the April 12, 1973 HiWay I order and pursuant to Judge Judd's May 2nd, 1973 order. (See text, infra at 54-55).[12]

Title III is silent on whether agents may rightfully enter premises surreptitiously to install court ordered listening devices without express authorization. The legislative history is scant on the issue of congressional awareness of the possible necessity to employ covert tactics in implementing electronic surveillance. At best there exist only oblique references depicting an understanding of the problems

surrounding installation and the shortcomings inherent in subsequent use when noise interference permeates the environment in which the bug is placed. See 114 Cong. Rec. 11958, 12989 (1968). This limited congressional direction is further compounded by a paucity of decisional law that deals only indirectly with the issue.[13]

In examining the safeguards that must be afforded, a significant distinction must be kept in mind. Twin aspects enshrine the process of electronic surveillance; the first is the means employed in installing the monitoring devices while the second is the actual interception itself. United States v. Agrusa, supra, at 11. It is this latter aspect at which the thrust of Title III is directed. Detailed facts must be outlined sufficient to show probable cause in order to guard against the indiscriminate initiation of electronic surveillance. To assure that only pertinent conversations are seized, strict minimization requirements are imposed. Fabrication and alteration are supposedly prevented by the demands for judicial sealing of taped interceptions. In short, Congress devised a scheme whereby the judiciary was vested with supervisory control over law enforcement's investigatory methods. Their intention was to ensure that the free flow of conversations and the sanctity of a person's random thoughts would not be

jeopardized by technological developments in surveillance techniques and the consequent potentiality for abuse.

The very breadth of the statutory authority vested in the court coupled with the serious nature of the intrusion involved casts an extraordinarily heavy burden on the authorizing judge in deciding whether or not an intercept order is to issue. Not only must he find that sufficient probable cause exists, but he must be satisfied that electronic surveillance is the only investigatory device that will prove successful. The very detailed nature of the requirements set forth in 18 U.S.C. § 2518 demands that the closest scrutiny be given applications for intercept authorization.

That consideration was given by Judge Bartels when the HiWay I order issued on April 12, 1973. Moreover, this court exhaustively reviewed the government's affidavit submitted in support of that order and confirmed that sufficient facts were recited to establish probable cause and to show a particularized need for electronic surveillance. As was pointed out earlier in this opinion, it was obvious that listening devices installed in the rear area of the lounge were the only means left to the government by which to gather prosecutable evidence against the executives of the enterprise.

Moreover, Judge Bartels was not without knowledge

as to what kind of devices were to be employed and how installation was to be effected. Special Attorney Barlow testified that in response to Judge Bartels' inquiry, he informed him of their plans to enter the lounge at night with a passkey in order to plant the bugging devices. The judge's question indicated his awareness of the inherent necessity to surreptitiously enter the premises to effectuate the court order.

It is this court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment. The circumstance underlying the issuance of an intercept order is analogous to the issuance of a traditional search warrant. Both the intercept order and the search warrant serve to sanction intrusions otherwise constitutionally prohibited. The privacy intrusion legitimized by the warrant is the entry into the private confines of the premises, the search and subsequent seizure of physical objects. The warrant itself serves to delimit the places to be searched and the items to be seized in keeping with the particularity requirements of the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443,

467, 91 S.Ct. 2022, 2038 (1971). The purpose to be served by the intercept order is to validate the intrusion resulting from penetrating the arena of confidentiality surrounding criminal conversation which monitoring enables, the interception of that secret conversation, and the subsequent recording. Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence, there need not be express authorization in the intercept order that issues for that prerequisite. Judicial control over agents' activities, which is the underlying intent behind the entire wiretap scheme, is adequately accomplished by the limitations specified in the order, in satisfaction of Fourth Amendment requirements, as to the type of surveillance authorized, the location where surveillance is to be conducted, and the type of conversations that can be intercepted.

To order suppression when a court order issued solely because it does not expressly define the permissible methods of emplacement is to propound mere form over substance. This is not a case where government agents were given unrestrained discretion to choose whatever means they desired to effect installation. Hence the court's pronouncement in

United States v. Ford, 414 F. Supp. 879 (D. D.C. 1976), is inapplicable to the case herein. (See N. 13). Sworn testimony was given by Special Attorney Barlow concerning his conversations with Judge Bartels as to the contemplated method of entry. A record existed of the court's implicit consent to nighttime entry by use of a passkey. Where as here surreptitious entry during late night hours was shown to be the only means by which to effectuate the purpose of the HiWay I intercept order, it would contravene all logic to suppress the evidence gathered. Accordingly, Napoli, Sr.'s motion to suppress on the grounds that installation of monitoring was surreptitiously accomplished is denied.

Judge Judd's May 2nd Order

Upon expiration of the HiWay I order on April 30, 1973, monitoring agents discovered that the batteries supporting the listening devices had failed. The government had advance knowledge that an important meeting was to be conducted on May 3rd at the lounge. However, authorization from Washington for permission to apply for an extension order was not expected to arrive until May 3rd. The FBI's dilemma was obvious. If the HiWay II order would not issue until May 3rd, there would be no way to enter the premises to fix the lifeless devices before the impending meeting took place. There-

fore, on May 2, 1973, Special Attorney Barlow appeared before Judge Judd seeking a warrant permitting nighttime entry into the lounge in order to correct the failure. Pursuant to Barlow's representations and the HiWay I order signed by Judge Bartels, Judge Judd issued an authorization accommodating the government's request.

Defendants argue the order was unlawful. They contend that Barlow's oral representations fell short of satisfying the requirements of 18 U.S.C. § 2518(5) relating to the necessary contents of an application for an extension order. We disagree, however, with defendants' characterization of Judge Judd's May 2nd authorization as an extension order. It did not permit continued surveillance. The order simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it is more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. § 2518(3) need not be satisfied. Only probable cause need be found to justify its issuance. More than ample probable cause existed. Hence, the order lawfully issued.[14]

Conclusion

For all the reasons heretofore cited, defendants' motion to suppress is denied in all respects, and it is

SO ORDERED.

U. S. D. J.

FOOTNOTES

1 The motions were decided prior to trial from the bench. At that time, the court indicated it would file a memorandum of decision after the jury made its determinations. After a rather lengthy trial, defendants Voulo, Mascitti, Scafidi and DiMatteo were found guilty on two substantive counts involving violations of 18 U.S.C. § 1955. Defendants Carrera, Vigorito, DeLuca, Napoli, Jr. and Napoli, Sr. were convicted on one count charging a violation of 18 U.S.C. § 1955.

2 The December 8, 1972 order, as well as all other orders hereinafter referred to, were to run for a period of fifteen days exclusive of Sundays with the exception of the May 24, 1973 order (HiWay III) which was to cover a span of twenty days.

3 The conversations seized under the May 24, 1973 HiWay III order were not offered, and the validity of the seizure is therefore not discussed.

4 Title 18 U.S.C. § 2516 lists the offenses for which electronic surveillance orders may be issued as an investigative tool; it includes ". . . any offense which is punishable under . . . section 1955 (prohibition of business enterprises of gambling) . . ." 18 U.S.C. § 2516 (c).

5 On May 1, 1972 agents of the FBI executed a search warrant at the premises located at 967 East 2nd Street, Brooklyn, New York. The agents seized quantities of adding machine tapes, pads, and papers later analyzed by experts to have been of the type used in professional numbers writing operations. Located within this policy "office" were three individuals, two of whom are defendants in the instant action; Mustaccio and Voulo. Mustaccio, after receiving his Miranda warnings, advised the raiding agents of his longtime participation in policy operations. On February 17, 1972 a brown bag containing similar gambling paraphernalia was recovered, pursuant to a warrant, from a truck driven at the time by Riccardi.

6 As recently as March 30, 1972, agents who had Mustaccio under surveillance, recovered and confiscated the contents of the trash can in front of his home. Several pieces

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of paper were found and analyzed as documents associated with a numbers writing operation.

7 The court rejects defendants' contention that exclusion is proper even if the court found the facts insufficient to constitute probable cause. A significant distinction must be kept in mind. The review here is not of a situation where law enforcement officials have usurped their function and made the probable cause determination themselves. Resort was had to a "neutral and detached" judicial official. While it is conceded that a constitutional aspect of the wiretap law is implicated - probable cause - it is nonetheless shortsighted to mechanically declare that exclusion is altogether proper where the judiciary has intervened.

As the court in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974), said, "The application of the (exclusionary) rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Id. at 348, 94 S.Ct. at 620. Last term the Supreme Court finally settled all questions as to the role the exclusionary rule is to perform. Stone v. Powell, U.S. , 96 S.Ct. 3037 (1976). Noting its limited force, the court expressly rejected the notion of judicial integrity as a viable justification for the exclusion of highly probative evidence. Rather, the court concluded that exclusion serves only the end of deterrence. Stone v. Powell, supra, at , 96 S.Ct. at 3047-49.

The rule's efficacy as a device deterring illegal police conduct notwithstanding, it would seem that its function is served when law enforcement officers have in fact sought in good faith the authorization of a judicial officer. The magistrate's or judge's initial review itself serves as the barrier to otherwise unlawful searches. Such is not the case where police act on their own initiative and resort to the rule must be had if there is to be a significant deterrent to misconduct. Korman, Criminal Procedure Instroduction, The Second Circuit Review, 1974-75 Term, 42 Brooklyn L.Rev. 981 (1976). But see United States v. Karathonos, 531 F.2d 26 (2d Cir. 1976), cert. denied, U.S. , 96 S.Ct. 3221 (1976).

As it is, the rule often confers "an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large." United States v. Burke, 517 F.2d 377, 386 (2d Cir. 1975) quoting United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969). To continue to apply the rule where there has been an error in judgment suggests that the underlying remedial objective is lost sight of and the sanction is imposed on the wrong party. Where a magistrate or judge is shown to act as a mere rubber stamp, the more direct and effective remedy is removal for "neglect of duty."

8 Under the 309 I order, the first report was filed on December 18, 1972, two working days after the required date of submission; the second was timely filed. Pursuant to the 309 II order, the government timely proffered the first report, but failed entirely to file the second. Under the 309 III or 91st St. order, only a single report was filed. There was full compliance with the court's dictate under the HiWay Lounge orders.

9 The order provided in pertinent part that interception "be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception under Chapter 119 of Title 18, United States Code . . . ."

10 Agent Parsons had previously served as a supervisor at the Federal Bureau of Investigation Academy, Quantico, Virginia instructing field agents in gambling investigations.

11 Title 18 U.S.C. § 2518(10)(a) provides for suppression of evidence gathered pursuant to electronic surveillance where:

(i) the communication was unlawfully intercepted;

(ii) The order authorizing interception was facially insufficient;

(iii) surveillance was not conducted in conformity with the limitations set out in the court order.

As can be seen, section 2518(10)(a) does not mandate suppression for any post-seizure violations of the electronic surveillance scheme.

12 The court finds that no other defendant, specifically James Napoli, Jr., had an interest in the premises sufficient to confer standing.

13 This court in its research found two reported decisions that dealt with the issue of surreptitious entry by government agents to install court authorized listening devices: United States v. Agrusa, Slip op. (8th Cir., July 6, 1976), and United States v. Ford, 414 F. Supp. 879 (D. D.C. 1976).

In Agrusa, government agents investigating the defendant for the theft, possession, and sale of property stolen from interstate commerce, in violation of 18 U.S.C. §§ 659, 2315, and 371, secured a court order authorizing electronic surveillance for a period of 20 days at defendant's place of business. The order specifically authorized the government "to make secret and, if necessary, forcible entry any time of day or night . . . upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises." Pursuant to this order, government agents forcibly entered the defendant's body shop after regular business hours and planted a listening device. On appeal, the defendant argued the district court could not validly issue such authorization consistent with the Fourth Amendment and other applicable law.

The Eighth Circuit found both constitutional and statutory support to reject Agrusa's contention; they held the government's forcible entry proper when executed pursuant to express authorization contained in the intercept order. The court, however, specifically noted that they were not rendering a decision on the propriety of the government's actions when taken without express authorization. Id. at 11, n. 13.

A similar question as to the propriety of covert actions by government agents was treated in United States v.

Ford, supra. Therein, a twenty day intercept order provided:

> (d) Members of the Metropolitan Police Department are hereby authorized to enter and re-enter the [premises] for the purpose of installing, maintaining and removing electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse or strategem.

The bugs were installed by a team of officers posing as members of the bomb squad during a bomb scare ruse used to evacuate the premises. The following day, it was discovered that the eavesdropping devices were not working. Police re-entered the same way and the malfunctioning devices were replaced. Representations were made to the reviewing court that judicial approval had been secured for the second entry. This authorization, however, was never transcribed.

The court recognized the inherent necessity to employ covert tactics in effectuating the intercept order, and the consequent power of the issuing court to authorize surreptitious activity. Id. at 882-83. The court, however found the above noted authorization overbroad in that it vested police with unrestrained discretion as to the means to be employed in installing the court ordered listening devices. The court indicated though, that the facial overbreadth of the provision might have been avoided if court authorization for each entry was recorded. The representations of the government attorney as to his conversations with the authorizing judge, concerning the means to be employed in entering the premises on each occasion, were never presented by affidavit nor sworn to under testimony.

14 We submit, however, that if an extension order had issued prior to the government's re-entry and restoration efforts, express concomitant authorization to re-enter would not have to have been included in the continuation order. If a court is apprised of the need to re-enter to fix failing devices at the same time it is considering the

application for the extension order, and the order in fact issues, there is inherent authorization for government agents to enter and repair spent equipment if entry is shown to be the only way by which reparation can be accomplished. (See text, supra at 52-54).

your Honor, within the context of the conspiracy, these are meaningless. It doesn't show knowledge of awareness. The operations that are sought to be tied into these alleged one or multiple conspiracies, awareness alone --

THE COURT: I have heard enough.

Mr. Franconero, I am not going to hear you now. Your matter may be disposed of by what I am about to say.

I spent this lunch hour reviewing the arguments and going over Count 4, which in the superseding indictment was Count 7. And I find that the Government claims thatthere are three parts to thisconspiracy, one basically located in Brooklyn during the period of June 16, 1971 to June 21, 1974. And the second part, which the Government calls legs, basically, and working out of Yonkers during the period that is referred to, in December of 1969 to March 1975.

And the last leg from April 15th to May 15th, in that area, is called the Jersey part.

(Continued next page.)

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THE COURT: (Continuing) The Government claims that the welding force in all this conspiracy or in this conspiracy, rather, is James Napoli, Sr., who is the link.

Now, James Napoli's involvement or rather proof of his involvement first came to the attention of the authorities, as far as this case is concerned, may have had suspicions, in the bugging of the Hiway Lounge in April, 1973, and continuing thereafter for a few months.

There is some indication that he exercised control over the Brooklyn part for some period of time prior to April, 1973.

Certainly for a period of at least six months, and the fact that he loaned Mr. Altese some money might show that he exercised some authority or control over part of the Yonkers leg or part -- but the Government says the Yonkers portion goes back as far as 1969, though the conspiracy alleged in the indictment is 1971, as the commencement.

There is no showing that Napoli, in any way, exercised any control over that part of the conspiracy.

MR. BARLOW: That's not true, your Honor. It hasn't been argued yet. That's why --

THE COURT: I'm rendering my opinion, Mr. Barlow. I won't hear any further argument.

I'll even assume what Mr. Barlow said, that there is someevidence, because he said that he's been in the business for five years, but that doesn't show that he exercised authority over the Westchester part in the manner in which the Government says he exercised control over the Brooklyn portion.

But I don't have to reach that because it's clear that the Jersey leg or part, at least clear to me, that it is here improperly.

I find a difference in the role that the Government shows as exercise by Mr. Napoli.

More importantly, I find a difference in the purpose of the New Jersey portion.

The New Jersey portion of the conspiracy is alleged to be based on violation of New Jersey law and the operations that are based in New Jersey.

The mere fact that it constitutes a violation of New York law to talk about or conspire about operating policy in New Jersey does not change the object of this conspiracy.

The object of this conspiracy is shown was to operate a New Jersey branch, based on a New Jersey

violation. It's a different statue, the personnel is different.

Mr. Napoli's role is different and I find that at least two conspiracies are alleged, maybe three. But that the New Jersey leg was actually a different conspiracy.

For that reason, I dismiss Count Four, Count Seven, in the indictment.

All other motions -- all other motions --

MR. WOFSY: Might I be --

MR. BARLOW: Your Honor, may I -- may I note my objection, a strenuous objection, to the Court dismissing Count Four, when the Government has not been allowed to show the connection between other persons other than Mr. Napoli, between the New Jersey portions and the New York portions of the one conspiracy that there is.

Since there is evidence, the Court did not --

THE COURT: Mr. Barlow, you took about an hour and 15 minutes to outline the nature of the con spiracy and I listened to you very attentively, and if you failed to take that opportunity, then, please, don't lay the blame at the feet of the Court.

The count is dismissed. You can make any

other statements you want for the record.

MR. BARLOW: All right, your Honor. I'm sorry, but the reason that it took an hour and 10 minutes is that the Court wanted me to proceed in a slightly different fashion than I had everything outlined from last night and this morning, and the connecting links between New Jersey and New York are not only Mr. Napoli Sr., but Mr. Carrara, Mr. Vigorito, the conversations that they had, conversations that they had with the New Jersey people, the telephone numbers showing the inter-relationship between the Brooklyn people, the Legs 2 and the New Jersey legs and the fact that with all the Court has said, the Court has not reached the fact that when Mr. Napoli talks with Mr. -- well, with Mr. Radziewicz, also. but when he talks with Mr. Cassella, when he talks with Mr. Rossi, and when he talks with Mr. Macchirole, he is talking about his promoting gambling.

Even though the gambling -- and notice, the gambling slips stay in New Jersey, he's talking about his gaining of the profit, the top 10 per cent of the gross from New Jersey.

They all agree and when Mr. Macchirole and Mr. Napoli talk in the Miway Lounge again about

New Jersey, Mr. Macchirole says: Who do we got in Jersey; and mentions Mr. Rossi, Mr. Intromasso, several other men; and in addition the conversations with Mr. Cassella show that he talks with Mr. Rossi.

The conversations with Mr. Rossi show that he talks with Mr. Cassella and the conversations with Mr. Macchirole show that he talks with both of them all about the same price war in New Jersey, all about the same giving of controllers percentages, expenses, commissions, and I think there is more than enough evidence to show that this was one operation, since another factor that hasn't even been discussed is the committee of scale.

The only reason that Mr. Napoli is able to have a business of this size without laying off certain numbers is because of the size of the business.

THE COURT: Have you said everything you want to say?

MR. BARLOW: Everything I can think of off the top of my heard, your Honor.

THE COURT: All right. I can't base any decison on anything you can't think of.

MR. BARLOW: I realize that, your Honor.

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THE COURT: Have you said everything you wanted to say?

MR. BARLOW: Yes, sir.

THE COURT: For the reasons previously stated, I abide by my original decision to dismiss Count Seven, because it hasn't changed any of the reasons.

We still have a conspiracy based on New Jersey statute, to be operated in New Jersey.

We still have different personnel. The management might be the same, but there is still additional management.

We have Mr. Napoli's role entirely different. There is no showing -- don't shake your head: No.

I made a determination. You can shake your head: No; until it shakes off. I'll still abide by it.

In the Brooklyn operation, I heard testimony of Mr. Napoli directing the entire operation, leaving it to supervisors, asking about payment and how much people would pay, talking about time that bets were to come in. Nothing like that in Jersey.

I assume that was left to Mr. Rossi and Mr. Cassella, I think. His role was entirely different. It is not as if you had one individual from one desk operating three operations.

7

You had Mr. Napoli from one desk operating one and possibly two, possible Westchester. But he was just a partner sharing the profits over in New Jersey.

As I see it, there is no --

MR. BARLOW: No, sir.

THE COURT: You say no.

MR. BARLOW: And the evidence is this:

First --

THE COURT: This isn't the first time you've overruled me in this trial, but it's had no effect on me, Mr. Barlow.

MR. BARLOW: Your Honor, assuming what the Court -- and the Court has ruled, I would think that that's a valid basis to dismiss Mr. Cassella and Mr. Rossi.

THE COURT: Wrong. It's a different conspiracy charged. It's not only that.

The result is far different. If I could do that and save the conspiracy count, it's different. But you alleged and proved two conspiracies. It requires dismissal.

What it really says is: There should have been two different counts. If I had two different counts, I'd probably dismiss one of them, if it

contained a New Jersey conspiracy, as improper joinder.

But I can't do that here. This is the count. Can't dismiss half of it, say: Forget about Rossi, it wasn't part of the conspiracy.

You alleged two different conspiracies. In effect, what it is you relegated to the two substantive counts --

MR. BARLOW: The three, your Honor.

THE COURT: The three substantive counts. How do you want me to treat this before the Jury?

Oh, the other question about Mr. Pinto's -- the sufficiency of the evidence against Mr. Pinto is moot, because of the determination and the same goes for your argument, Mr. Franconero.

MR. FRANCONERO: Yes, sir.

THE COURT: I didn't quite believe it anyway. I might have very well dismissed Pinto but I doubt if I would have dismissed Rossi on your argument.

MR. O'BRIEN: Will your Honor entertain motions to strike various testimony?

THE COURT: Yes. I will strike all the testimony that related to the New Jersey operation between Rossi, Cassella and I forget who else.

MR. WOFSY: Your Honor, perhaps --

but I think in any joint crime, where you can show an agency, that your bound the same as if a conspiracy were alleged.

MR. WOFSY: Fine.

Well, I --

MR. BARLOW: As I said, I -- and I believe before he talks about his problems with the New York side of the business, the direct quote is when he says, "Who do we got in New Jersey," and then goes through Rossi, Intromasso --

THE COURT: How is he part of this business? Isn't this the New York business?

We're talking now on the substantive crime?

MR. BARLOW: Yes, sir.

THE COURT: Being a business of five or more people? Of which five or more people, is he a part of?

MR. BARLOW: Well, your Honor, our connection is that he's part -- that it's all one business and that Mr. Napoli is the man who is taking the 10 per cent off the top of everybody who banks their business with Mr. Napoli.

THE COURT: Then your argument is the same as you made on the conspiracy.

MR. BARLOW: Yes, sir, it is.

THE COURT: Then I have to come to the same

4 is alleged to -- well, the only count in which he is charged, that it has not been connected with him, that would be physical evidence, be entirely unconnected with him.

I'd ask that all that be stricken.

THE COURT: I'll make a general charge about any seizure before the date when the business was shown to have started, admissible only against the individual whose property was seized, to show that he entered the business wilfully. Even though, as I explained while you were outside consulting, even though this isn't in the strictest sense a conspiracy, it is in the logical sense a conspiracy.

In my opinion, all the charges that would be relevant to a conspiracy were relevant to a business. The reason that conversations attributed to one conspirator are chargeable against others found to be members of the conspiracy is because it's a joint crime and it's a theory of agency.

The same would be true of a business.

MR. DiCARLO: Your Honor, on t' , I had made a motion on the grounds that the evidence showed one business with a theory of one business. I would like to reiterate that in view of the present developments, if the three counts and three separate businesses

THE COURT: In my opinion, that's what it is.

MR. NEWMAN: May I be heard?

THE COURT: We had four before. It doesn't change much.

MR. NEWMAN: May I be heard in two respects? One --

THE COURT: Does anyone dispute that, that when you have a joint crime like this where five or more are charged, that if it shows that there was a business of five or more that one is the agent for the others?

MR. HANNAH: I would say if you are basing it on --

MR. LAIFER: Not as each individual count.

THE COURT: As if they were separate. Only to each count. Can't be agents for other conspiracies charged in the count. It's only in that particular count. That's all I'm talking about.

MR. LAIFER: Can the jury understand?

THE COURT: That's my job. If they don't then it is my fault.

MR. HANNAH: Judge, if you are putting it on an agency basis now rather than a conspiracy basis, acts or statements of conspirators go back to the beginning of the conspiracy. But I don't think

7 an act can be held responsible for statements until an agent -- until he becomes an agent.

THE COURT: I don't want to make new law but I think that if this -- if this point is raised, under 1955, I predict that our Appellate Courts will religiously follow everything that is said about conspiracy because conspiracy is no different than this business.

The whole basis for the charge in conspiracy is as a joint crime. If they say that you are responsible from the beginning, if they say -- when-- even though he enters the conspiracy later, I say that it is true here and when they say there must be affirmative proof to show you left the conspiracy, I say that the Appellate Courts will say it is true of a business, too.

There is no difference because it all developed from the idea that it was a joint crime.

MR. ROSENKRANZ: If it is a joint crime or a conspiracy, again, don't you have to prove that at least the defendant knew one of the other persons in the count?

MR. WILD: Much more than that.

MR. ROSENKRANZ: I don't even have that against my client.

8 THE COURT: Knew one of the other persons?

MR. ROSENKRANZ: There is no showing that he knew any of the people in the count with him.

THE COURT: The charge may have to be that he knew that he was in a gambling conspiracy that included five or more persons.

MR. ROSENKRANZ: I'm saying that he had to know one of the people.

THE COURT: Personal contact?

MR. ROSENKRANZ: At least talk to one of the other people.

THE COURT: How about a postcard, would that do it?

MR. ROSENKRANZ: Anything.

THE COURT: How about touching an envelope, would that do it? What do you mean "contact"? Contact with whom?

MR. ROSENKRANZ: With any of the co-conspirators. An agreement.

THE COURT: Why were -- where is that in the statute?

MR. ROSENKRANZ: Judge, I have never seen a case of -- conspiracy case where there isn't at least some allegation that one of the defendants knew one of the alleged co-conspirators. And there

12 definitely evidence of a prior similar act.

And it ties right in with Mr. Vigorito.

THE COURT: I'll allow it as evidence of a prior similar act.

MR. NEWMAN: Now, Judge, directing your attention to Count 4 of the old indictment,and I refer to it as Count 4, that's the substantive -- will you gentlemen be quiet for a minute? -- which refers to my client in the substantive act, I respectfully --

THE COURT: Count 2 as we are giving it to the jury.

MR. NEWMAN: Okay. Count 2 or 3, rather.

MR. WILD: Count 3.

MR. NEWMAN: All right. Count 3 of the new indictment.

I respectfully ask your Honor in view of the fact that your Honor has made a finding of separate conspiracies, vis-a-vis, if you will, the New Jersey group, at least, for example, Radziewicz in that count, Cassella is in that count and the count is a substantive count, -- in view of your Honor's -- and Macchirole also -- and in view of the fact that your Honor has made this finding of separate conspiracies, how does it now affect Count 3, where my client is

13 named in that count, in a substantive count with these people.

THE COURT: I'll answer that. I'm sorry you weren't here when I dismissed against Mr. Cassella. That's how it affects him. Mr. Cassella is out.

MR. NEWMAN: All right.

THE COURT: New Yorkers are in.

MR. WILD: The other New Jersey people; Mr. Macchirole, Mr. Radziewicz should both be out as well as Mr. Cassella.

MR. BARLOW: They have never been mentioned, your Honor.

MR. NEWMAN: Judge --

THE COURT: They are not before me.

MR. NEWMAN: I would most respectfully, in light of that, make the following motion, if you will, your Honor. Following two motions:

Number one, your Honor: I would move for a severance at this particular moment.

THE COURT: Motion denied.

MR. NEWMAN: I submit, most respectfully, I know your Honor is sort of pressed for time but I would submit --

THE COURT: No more. No more. We have the whole afternoon now to talk about it.

14 MR. PASSALACQUA: Where is the jury, your Honor?

THE COURT: They are back there waiting.

MR. ROSENKRANZ: Why don't we send them home?

MR. NEWMAN: Would it be a good suggestion to send them home?

In view of all of that, if your Honor please, in view of the complexity of the submission of the Government's proof, in view of the way that was presented in these bifurcated sessions, in view of the wealth of evidence that was produced, for example, against 309, for want of a better description and in view of the fact that the guise of that was the fact that one conspiracy count that we all had to sit here and listen to -- I would respectfully move for a severance on the grounds that the issues are so complex at this point that so much material was allowed in subject to being stricken that I respectfully suggest to your Honor that I can't even follow to know what specific evidence I should direct an objection to.

THE COURT: Motion denied and I will assume everybody made that motion and everybody can take advantage of it. Denied.

MR. NEWMAN: In the alternative, Judge, one

more motion and then I won't bother you.

I move in behalf of my client for a mistrial.

MR. WALLACH: I join.

THE COURT: Everybody is in it. Everybody made a motion for mistrial. Prejudice. Because of the striking of the testimony, won't eliminate it from their minds and up until now all the lawyers have been saying that the jurors can't follow it, they know nothing about it but for this purpose they do know about it and you are prejudiced, your client. And the motion is denied.

I'm making both arguments.

MR. WILD: The problem --

MR. HANNAH: May I make a motion to suppress the evidence seized in September 1972 on which Mr. DiMatteo's fingerprint was found, on the ground that it's not included in any of the remaining counts?

THE COURT: The same purpose, Mr. Barlow?

MR. BARLOW: Of course, your Honor.

THE COURT: If it is proof of a prior similar act I will allow it to stay in.

MR. WALLACH: In connection with that, your Honor, if there is any proof here of similar acts even on the part of Mr. Scafidi, I respectfully request

or right and I will appreciate it. In other words, can the jury be instructed the $2,000 found in Elderts Lane --

THE COURT: It has nothing to do with the case. The only thing that has to do with that is the prior similar act. If it's a gambling venture for $2,000 or $10, that's all, it's a prior similar act.

MR. WILD: I don't know if this is a good time to follow.

MR. LAIFER: What are you going to do now, Judge? Are you sending the jury home?

MR. WILD: I have an application.

THE COURT: Go ahead.

MR. WILD: I have several requests of your Honor and two can be stated briefly.

One, your Honor strike all searches and seizures and arrests in which my client was not involved personally, or alternatively. instruct the jury they can't use it.

And the second --

THE COURT: Even seizures of material during the term of the conspiracy where there is proof that these individuals were runners or controllers?

MR. WILD: Unless and until it's tied to my

RAP:BD 3pm2

THE COURT: The only thing that happened in this case, instead of four conspiracies, we have three and six defendants walked out; that's all.

MR. WILD: In light of your Honor's ruling as to multiple conspiracies being charged, I ask that the counts which have been severed which embody the same thing also be dismissed. That's Count 1 and 2 of the superseding --

THE COURT: Denied. That motion was made. Denied.

Because I dismiss because of multiple conspiracies on one count, I should now dismiss the other count because it includes multiple conspiracies?

That's not true. It's now three separate counts.

MR. WILD: I am talking about the counts which have been severed, not the counts on trial.

THE COURT: I will not consider anything that's not before me.

MR. WILD: Okay, sir.

THE COURT: Mr. Wild, when this case is over, make your other motions, will you please. I am trying to get the jury here and it's now 2:30.

MR. LAIFER: Judge Mishler, sir, are you working tomorrow? Friday?

17 MR. PIAZZI: May they be deemed marked in evidence?

THE COURT: No. That's not marked in evidence. If you want to mark it in evidence, prove the relevancy and --

MR. PIAZZA: I'll withdraw the offer.

THE COURT: Seat the jury, please.

(Jury present.)

THE COURT: Good morning -- good afternoon.

In your absence, I've dismissed Count 4 of the indictment, and that means that the defendants Frank Altese, Martin Cassella, Frank Pinto, Carmine Pirone, Kenneth Rosse and Jospeh Simonelli are no longer before you.

I also dismissed Count 3 against the defendant Annarumo, Cassella.

Now, the dismissal of a count of the indictment or the dismissal against a defendant as to a count simply means that I found, as a matter of law, that there wasn't enough evidence in the case to submit to the jury as to that count.

That has no effect whatsoever, one way or the other, as to any of the remaining defendants as to any of the remaining counts.

All I found is that there was not enough evidence for you to consider. I don't weigh the credibility

18 of the evidence. I don't weigh the weight of the evidence. I don't weigh the effect of the evidence. That's solely for you.

Now, because I dismissed the count and I dismissed the count against Simonelli and Cassella, or I dismissed Count 3 as to Cassella and Annarumo, it means the focuse of attention as to the issues in the case is somewhat shifted.

There is some evidence which related only to Count 4 which, of course, is no longer in the case. So, for example, the seizure at 100 DeHaven Drive up in Yonkers, where the items were found in a pillow case, for example, is no longer in the case.

That applied only to Count 4. So that is stricken from the record and I ask you to disregard it. There are other considerations because of striking Count 4 and I'll briefly refer to them.

The three remaining counts are what we call substantive counts. They charge that five or more defendants were in the policy business during different periods of time. When we talk about a business, joint enterprise, we think of the partners binding each other as to matters that are said and done during that term, the term of the business, and on matters concerning that business, in this case,

Policy.

Since you have three separate, distinct businesses charged, you must be careful in assessing testimony against one partner when he isn't present, when he wasn't aware of what was said or done.

The absent partner is only bound by the partners he has in a particular business and during that particular term. So, for example, if you have, as you have in Count One, the defendants Annarumo, D'Avanzo, Scafidi and Voulo, charged with being in the partnerhsip from March to July, 1972, and then in the next charge, Count Two, you have DiMatteo, Mascitti, Riccardi, Scafidi and Voulo, and that business is alleged to have been conducted from December 13, 1972 to March 9, 1973. Or, for example, if there is testimony that Mr. Scafidi or Mr. Voulo said or did something, they are charged in two counts.

Now, Mr. Annarumo or D'Avanzo may be bound, if you find that they are part of the same business and it was said or -- and done during this time, for the purpose of the business if it occurred during March 1972 and July 1972.

(continued next page.)

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But it would be improper to try Mr. DiMatteo or Mr. Moscitti or Mr. Riccardi with that conversation if it occurred before their business started, which was the next December.

So it's only during the term of that conspiracy or that business -- I call it conspiracy, but it's a joint enterprise -- during that business. And if you're going to charge a partner of a business -- we will call them a partner -- with anything his co-partner said, make certain that the absent partner is a member, a partner, of that business and what was said during the time he was a partner, and what was said was said for his, the absent partner's, advantage as being a partner in the business and to promote the business. That's one thing I think you have to be alerted to.

The second thing is this:

For example, the Government introduced a seizure of Mr. D'Avanzo on November 4, 1971. Well, the charge is that he wasn't part of the business until March of 1972, more than a year before.

MR. ROSENKRANZ: A year later.

THE COURT: D'Avanzo, I said.

MR. ROSENKRANZ: I think your Honor meant a year later.

THE COURT: No, the seizure wasn't.

MR. BARLOW: No, November to May is about six or seven months.

THE COURT: I have November 4, 1971.

MR. BARLOW: Yes.

THE COURT: The time isn't too important. I don't care if it's a month before, a day before, a year before. The point is that the charge is that the business started about March 1972.

But one thing is certain, that the other members charged are not bound by what happened to Mr. D'Avanzo. There was no business until -- I will try to be a little accurate -- December, January, February or March, maybe four months later.

That evidence --and if you believe the evidence and if you believe it indicates engaging in policy business -- is before you for a very, very limited purpose.

The Government, in proving a charge, must prove that an accused acted with criminal intent; that the accused was aware of what he was getting into; that it was a policy business; and that he deliberately and with intent voluntarily performed those acts; that he was part of that gambling business that started in March of 1972; and that he didn't do it innocently

or accidentally.

So you may use that seizure in November 1971 solely against Mr. D'Avanzo, if you believe it is part of policy business to determine whether what he did in the business that began in March of 1972 was with criminal intent, that it wasn't innocent.

But you must guard against convicting an accused for a charge in the indictment that is not proven, merely because you have evidence that at another time he did do something that was illegal. That wouldn't be right.

A defendant under our system need only prepare to meet a charge in the indictment and nothing else.

So this is proof only if you believe it's proof of criminal intent -- this is proof against Mr. D'Avanzo of Count One during the period that started in March of 1972.

I hope I made myself clear on that.

The same thing is true of a charge against Mr. Lotierzo. Mr. Lotierzo is charged with being part of a gambling enterprise beginning April 13, 1973. There is evidence of a seizure of some material on February 26, 1971. The Government claims that this gambling material is proof that he was engaged in policy.

Well, don't use any of that evidence against the others that happen to be charged with the same count. That wouldn't be fair.

And again, you may only use it for the limited purpose of determining whether, if you find Mr. Lotierzo performed certain acts, thatgives the appearance of criminal activity. And if the Government proved beyond a reasonable doubt that those acts did show participation in the gambling business.

Now, when you come to determine whether Mr. Lotierzo understood and was aware that he was engaged in policy and that he deliberately and intentionally and voluntarily engaged in policy, knowing that it was illegal, you may use the prior seizure, if you determine that it does show policy, to determine whether those actions were with criminal intent or whether they were done innocently.

Now, I can't think of any other evidence that should be stricken, but the point is, and the rule is, that if it was related only to Count Four and it was unrelated to any of the remaining counts, you should just disregard it.

And I think we are ready for the defendants.

Mr. Brill, is the defendant Annarumo ready to proceed?

MR. BARLOW: Not this particular one, no.

MR. WALLACH: I object.

THE COURT: I will allow it in. I doubt whether it belongs here.

Mr. Barlow, you should be running for office. You say a lot of things, but I do not know what you are talking about.

MR. ROSENKRANZ: I am going to object, unless they can specifically say what count it refers to.

THE COURT: I will not require the Government to allocate or distirbute the evidence according to counts. There is a conspiracy count here and if it is not attributable to any other count in the indictment, then certainly to the conspiracy count.

Mr. Barlow apparently has some theories upon which he can connect it. I am allowing it in as evidence and I will keep my eye on it and will be stricken if he does not connect it.

MR. HANNAH: Your Honor, may I respectfull ask you to tell the jury at some point in your discretion that these exhibits that are marked for identification are not to be considered by them until they finally are marked and accepted in evidence. We are having a lot of exhibits here marked for identification. The jury sees something passed back and forth, they may not go

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

Renee Kenrow, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at New York, New York. That on the 8th day of February, 1977 deponent served the within Volumes I and II of the Joint Appendix to Brief for Appellants upon Michael E. Moore, Esq., the attorney for the United States in this action, at c/o T. George Gilinsky, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Renee Kenrow

Sworn to before me this
8th day of February, 1977.

Gloria J. Horn
Notary Public

GLORIA J. HORN
Notary Public, State of New York
No. 24-2047423
Qualified in Kings County
Commission expires March 30, 1977